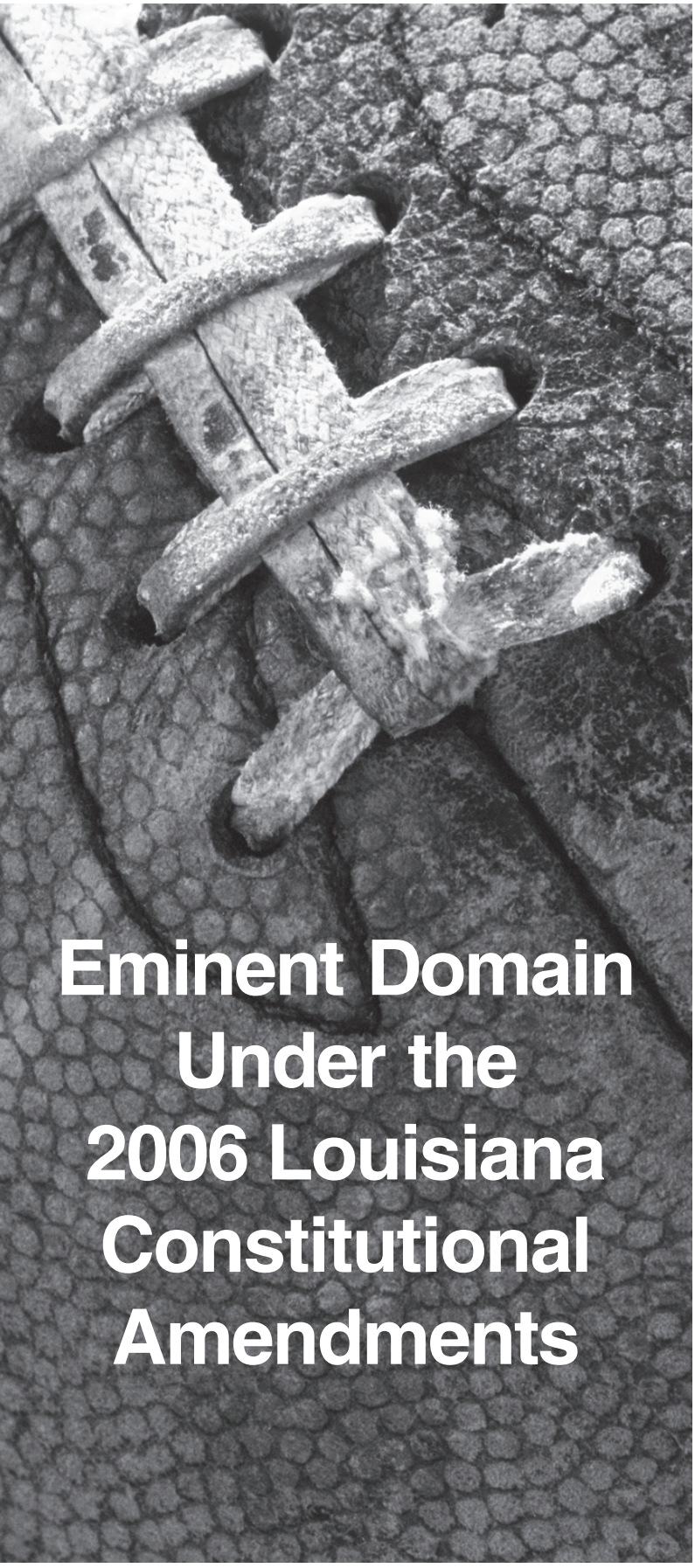

Eminent Domain Under the 2006 Louisiana Constitutional Amendments

The Legislature's Forward Pass to the Judiciary

By John J. Costonis[1]

The Forward Pass

Legislators who use undefined terms to define other undefined terms obligate the judiciary to clarify their obscure draftsmanship. The Louisiana Legislature enrolled the Louisiana Supreme Court as its eventual editorial partner when it drafted a set of 2006 Constitutional amendments[2] addressing transfer of expropriated property from former owners to other private entities.

The Legislature was seeking to narrow the scope of La. Const. art. 1, section 4's term "public purpose"[3] because it disagreed with the United States Supreme Court's majority in *Kelo v. City of New London,*[4] which favored government's power to deploy its eminent domain power solely to advance economic development. In a stinging dissent applauded by the Legislature, Justice O'Connor made two distinct points. First, government may not expropriate property and transfer it to a private entity solely to advance a community's economic development.[5] Second, government *may* take and transfer property that poses an "affirmative harm" in order to remove the property's threat to community health and safety.[6] In a dissent ignored by the Legislature, on the other hand, Justice Thomas opposed even the affirmative harm concession, insisting that property should never be taken unless the public is given a "legal right to use the property."[7]

The Louisiana Constitution's new art. 1, section 4(B)(3) excludes "economic development" as a section 4(B)(2) "public purpose," and its new section 4(B)(1) bans transfers "for" the ownership or predominant use of private entities, other than transfers licensed by article VI, section 21 destined for port or industrial use (hereinafter "industrial use property").[8]

Section 4(b)(2) affixes the "public purpose" label to a variety of governmental and public utility/common carrier takings. The new section 4(B)(2)(c) adds the label to takings designed for the "removal of threats to health and safety caused by the existing use or disuse of the property" (hereinafter "health and safety property").

The amended section 4(B)(1) seeks to redefine the term "public purpose," therefore, by utilizing the terms "for," "eco-

nomic development," "removal" and "health and safety." None of these subordinate terms is itself defined, however. All share the imprecision of the principal term, whose clarification is their object.

Harking back to a lengthy jurisprudential debate,[9] "for" could refer to the *purpose* of a taking or to its *result*. If "for" means *purpose*, then a transfer to a private entity is not barred by section 4(B)(1) so long as the private benefits associated with the transfer are incidental to its public advantages.[10] But the transfer will violate the public purpose requirement if "for" ignores intervening benefits associated with the transfer, and focuses only on the taking's *result* — the property's ultimate use or ownership by a private entity.[11]

"Economic development" can encompass virtually any government activity that advances community welfare. Its ambit, therefore, might comprehend attracting industrial/port entrepreneurs pursuant to art. VI, section 21, facilitating the provision of services by common carriers and public utilities pursuant to art. 1, section 2(B)(2)(a) and (b)(v), or pursuing countless other activities that, although not economically motivated in the first instance, may afford collateral economic benefits for the community. Contrarily, the scope of "economic development" will shrink if measured by the narrow paradigm of public programs designed to increase the community's tax base.

Context, again, determines all.

"Health and safety" is no less open-ended than "economic development." The entire post-1970 edifice of federal and state environmental law, for example, is predicated on government's pursuit of the values associated with these terms. Absent, again, a limiting context, the two sets of terms overlap, or, as the following statement of the Louisiana Supreme Court evidences, devour one another: "The fundamental purpose of all government . . . is to protect the morals and the health of the people and provide for their safety. *All* governmental activities, complicated as they are, have that simple end in view."[12]

Imprecision of the term "removal" risks bringing the necessities associated with its achievement into conflict with the 2006 amendment provisions restricting the transfer of expropriated property. Is "removal" accomplished solely by government's expropriation of the problem property? Or is something more required that may require the private sector's participation and, hence, that transfers be made to this sector?

Simply parsing the term "removal" doesn't help because either construction is plausible in the abstract. But decades-long experience with blight removal for individual parcels or entire neighborhoods reveals that expropriation of harmful property alone seldom "removes" the threat it poses to community health and safety. Transferring the property to a private entity subject to conditions designed to remove the threat is often an indispensable phase in an integrated acquisition/disposition process.[13] Pertinent as well in this search for meaning is the utter inability of such cities as New Orleans — Katrina's principal victim — to fund or maintain more than a tiny percentage of their devastated private properties absent the private sector's assis-

tance,[14] or to find exclusively governmental uses for this vast inventory.

Art. 1, section 4(B)(1), as earlier noted, is open to an interpretation banning all transfers of expropriated non-industrial property to private entities. New section 4(H)(1) might be read to further impede, if not totally discourage, these transfers by banning the sale or lease for 30 years of expropriated property not destined for port, highway, airport or transportation use unless it is first offered back at its current value to the former owner or, should the offer be declined, unless it is sold by open competitive bid.

The question posed when section 4(B)(c)(2)'s "removal" language is placed alongside the restrictive language of sections 4(B)(1) and 4(H)(1), therefore, is whether or not the latter two provisions govern the former provision, thereby undermining achievement of its purpose.[15]

The Judiciary as Downfield Receiver

The Legislature has thrown its forward pass to the state's judiciary. How will the courts complete the play?

The suggestions that follow are largely methodical, not substantive, although I believe context and public policy clearly favor an interpretation permitting private transfers of both health and safety and industrial use property. Space constraints limit these suggestions to three modest propositions: resolving the amendments' obscurity cannot be achieved within the four corners of its text alone; the judiciary must, therefore, complete the interpretative task left open by the Legislature; and, finally, in doing so, the judiciary does not usurp the Legislature's role. On the contrary, it discharges a duty foisted upon it by the Legislature's patent failure itself to resolve the interpretative conundrums it chose to embed in the 2006 amendments.

We can assume that the judiciary's starting point will be the four constitutional interpretation maxims recently reprised by the Louisiana Supreme Court in *Malone v. Shyne*:[16]

Maxim I: *Language that is clear and that does not lead to absurd consequences must be given its ordinary meaning.*[17] The amendments' text not only is unclear, of course, but also submits to multiple interpretations, some of which father consequences certain to frustrate the goals supporting the text's concern for both health and safety and industrial use property.[18]

Maxim II: *Constitutional principles are to be reconciled if possible, and each given meaning.*[19] One commentator's apt description of the amendments as a 'jumble of inconsistencies"[20] counsels the wisdom of Maxim II in sorting out the pathways and potential inconsistencies between achieving the goals underlying the expropriation of health and safety or industrial use property, on the one side, and restricting private transfers signed to achieve economic development, on the other.

Maxim III: *Ambiguity may be resolved by determining the intent of ambiguous language through its legislative history*.[21] The streaming video of the amendments' consideration by the House Civil Law Committee[22] and in the House's Floor Proceedings[23] and the more summary minutes of hearings conducted by Senate Committee on Judiciary A[24] record the amendments' legislative history.

Maxim IV: *Intent may be determined by the* "*object to be accomplished by its adoption, and the evils sought to be prevented or remedied, in light of the history of the time and the conditions and circumstances under which the provision was framed.*"[25]

The judiciary will likely be disposed to find its key for resolving the 2006 amendments' private transfer issue in Maxim IV, as substantiated by Maxim III's inquiry into legislative history. Despite some discord in the latter,[26] *Kelo*'s shaping influence on the amendments' formulation that shines through this history conclusively establishes, I believe, that the amendments were designed to align La. Const. art. 1, section 4 with Justice O'Connor's complementary positions rather than with Justice Thomas's no-transfer ban.

The courts needn't tarry at length with *Kelo* other than to note that the issue it posed and the position espoused by Justice O'Connor had long been commonplace at the state level. Like Justice O'Connor, state courts, which for our purposes are led by the Louisiana Supreme Court in its epochal *State v. Housing Authority of New Orleans* decision,[27] affirmed as a public purpose the transfer of expropriated property to private entities when the venture's purpose was elimination of a pre-existing threat to community health and safety.[28] Many of the state courts, moreover, invalidated transfers when the purpose was community economic development or enhancement *untethered to the removal of an affirma-*

tive harm.[29] These complementary positions appear not only in decisions of 11 state high courts,[30] but in at least 11 post-*Kelo* state legislative initiatives that, like Louisiana's 2006 amendments, permit expropriation to remedy blighted properties but not to serve economic development goals.[31]

The judiciary's examination of the amendments' legislative history will confirm that, absent *Kelo*, the amendments would never have seen the light of day.[32] Likewise evident is legislative support for the two dimensions of Justice O'Connor's dissent. The first is opposition to the *Kelo* majority's holding that government may transfer undistressed expropriated property to private entities for "economic development,"[33] a term the legislators repeatedly restricted to the paradigm of enhancing the community's tax base.[34] The second is the Legislature's seconding of Justice O'Connor's approval of eminent domain when employed to remove a threat to health and safety associated with the offending property.[35] The Legislature engraved its endorsement, of course, in art. 1, section 4(B)(2)(c), and reaffirmed it throughout the proceedings.

The single discordant note in this narrative is Representative Bruneau's opposition to the transfer of section 4(B)(2)(c) health and safety property in aid of New Orleans urban recovery. In his view, those favoring these transfers are "vultures" who must be prevented "from profiting from the misery of our citizens,"[36] "lions licking their chops"[37] or "lawyers" with "saliva dripping from their mouths"[38] in contemplation of future fees. "Abomination"[39] is the term he uses to castigate transfers of concededly blighted or abandoned property in aid of urban recovery. Eminent domain for *any* purpose — highway construction, urban recovery or otherwise — casts government into the role of "Big Brother sitting on top of you,"[40] eager "to grind you into dust."[41] When asked by a colleague if government has any role to play in New Orleans' physical recovery, he responded that government "is hindering the private sector . . ., and manipulates the lives of people."[42]

Will the judiciary regard these comments as personal to a single legislator or enshrine them as a solemn expression of the state's highest public policy? Courts will find it difficult to ignore two signposts as they address this question — undoubtedly the most important posed by the amendments' various uncertainties.

The first is that Representative Bruneau stood alone among his colleagues in his disdain for health and safety-based private transfers. Other legislators, of course, excoriated takings for economic development purposes,[43] while repeatedly embracing section 4(B)(2)(c) takings.[44] Not a single colleague joined Representative Bruneau in singling out section 4(B)(2)(c) takings as similarly tainted. The Legislature's single-minded focus on economic development-based expropriation, its repeated endorsement of Justice O'Connor's dissent, which does permit urban recovery-based private transfers, and its deafening silence regarding Justice Thomas' dissent, which does not, suggests no worse than its neutrality on the question.

A contrary conclusion requires an assumption that is not supported in the record: namely, that the Legislature chose to disregard its self-formulated distinction between health and safety- and economic development-based expropriations, and to allow its hostility to the latter to bleed over to the former.

The second signpost is the severe internal conflict in Representative Bruneau's testimony. More than any other legislator, for example, he meticulously and articulately endorsed Justice O'Connor's disagreement with her colleagues in his statement that the "core" of the amendments is "to prevent expropriation by a public entity of a person's property for *economic development* and flip that property to a third person."[45] This

position in no way impugns private transfers of health and safety property unless, again, the distinction between economic development- and health and safety-based takings is thrown to the wind. More forceful still is Representative Bruneau's insistence that the amendments are "an effort to bring our law back basically to where it was [pre-*Kelo* and the three Louisiana appellate opinions that, like *Kelo*, identified economic development with a "public purpose]."[46] Louisiana's pre-*Kelo* law, as the Louisiana Supreme Court confirmed decades earlier in *State v. Housing Authority of New Orleans,* anointed as an imperative public purpose the private transfer of expropriated health and safety property as a vehicle for removing the threat of affirmative harm posed by the property.[47]

The 2006 Constitutional amendments were fused in the heat generated by *Kelo v. City of New London*, an opinion as controversial for many in the property rights sphere as *Roe v. Wade* has proven for others in the religious values sphere. The Legislature has spoken, however falteringly. It is now up to the Louisiana judiciary to determine whether the Legislature spoke in the voice of Justice O'Connor or of Justice Thomas.

FOOTNOTES

1. Chancellor-Emeritus and Professor of Law, Louisiana State University Paul M. Hebert Law Center. Professor Costonis is serving at the request of the Louisiana Recovery Authority as a consultant to the New Orleans Redevelopment Authority in *New Orleans Redevelopment Authority v. Johnson*, (No. 2007-3102 Civil District Court for the Parish of New Orleans), which addresses whether the 2006 amendments prohibit the Authority from transferred expropriated blighted property to a private entity, Habitat for Humanity.

2. 2006 La. Acts 851 (amending La. Const. Art. I, section 4(B)); 2006 La. Acts 859 (adding La. Const. art.1, section 4(H)). Because there was a third constitutional resolution, 2006 La. Acts 853 (amending La. Const. art. 1, section 4(G)), the section originally designated 4(G) by Acts 859 was redesignated 4(H).

3. Throughout this article, the art. 1, section 4 term "public purpose" is treated as the equivalent of the federal constitution's Fifth Amendment's term "public use," which was the focal point of the litigation in Kelo v. City of New London, 545 U.S. 469 (2005).

4. 545 U.S. 469 (2005).

5. *Id.* at 500 (O'Connor J., dissenting). Under the majority's reasoning, Justice O'Connor cautioned, "[n]othing is to prevent the State from replacing a Motel 6 with a Ritz-Carlton . . . ." *Id.* at 502.

6. *Id.* at 500.

7. *Id.* at 521.

8. Although excluded from section 4(B)(1)'s restrictions, art. VI, section 21 expropriations are *not* excluded from art. 1, section 4(B)(3)'s ban on takings for economic development expropriations, raising the question, which is not addressed in this article, whether they have been wholly invalidated by this later-adopted constitutional provision.

9. *See* Jennie Jackson Miller, "Saving Private Development: Rescuing Louisiana from its Reaction to *Kelo*," 68 La. L. Rev. 631, 669 (2008).

10. *See* State v. Hous. Auth. of New Orleans, 182 So. 710 (La. 1938). Sustaining a statute authorizing a housing authority to expropriate property and transfer to private tenants use and possession of units constructed on the site, the Louisiana Supreme Court states that "the primary purpose of the legislation is not to benefit [the tenants] alone or any particular class; it is to protect and safeguard the entire public from the menace of the slums, and for that reason the acquisition of the property is for a public use." *Id.* at 749.

11. Miller, supra note 8, at 648-70.

12. State v. Hous. Auth. of New Orleans, 182 So. 725, 735 (La. 1938) (emphasis added).

13. The Louisiana Supreme Court illustrates the organic linkage between expropriation and private transfer of health and safety property in State v. Hous. Auth. of New Orleans, 182 So.2d 725, 745-46 (La. 1938), by highlighting the relation between slum clearance and the lease of expropriated health and safety property to private tenants:

> It is true that the Housing Authority is authorized to erect and lease houses to persons of low income, but that is a mere incident to the main purpose of the act which . . . is to clear the slums and thereby to protect the lives, the health and the morals, not merely of those who presently live in the slum sections and who will ultimately occupy the buildings to be erected, but of the entire population of the city.

Id. at 745-46.

14. The enormity of the recovery challenge facing New Orleans is detailed in Bureau of Government Research, *Mending the Urban Fabric, Blight in New Orleans, Part I: Structure & Strategy* (2008), which, in observing that more than 80,000 of the city's housing units were severely damaged by Katrina, states that "it is safe to say that there are over tens of thousands of blighted properties in the city." *Id.* at 1.

15. The unfortunate consequences for the state's urban recovery, which would follow upon a positive response to the question in text, recur for the state's economic recovery if the judiciary interprets Art. 1, Sec. 4(H)(1)'s right of first refusal and competitive public bid requirements to apply to expropriated industrial use property on the ground that this property, like health and safety property, is not expressly excepted from Sec. 4(H)(1)'s coverage. The state's ability to attract major industrial enterprises, such as the $4 billion Thyssen-Krupp steel plant for which it competed in 2006, would be defeated, of course, if, having expropriated the industrial site, the state could not transfer it directly to the industrial end user, but were required to offer it back to the former owner or to put the site up for competitive public bid.

16. 937 So.2d 343 (2006).

17. *Id.* at 349.

18. The principal negative consequence, of course, is nullification of the constitutional purposes set forth in art. 1, section 4(B)(2)(c) and art. VI, section 23, removal of threats to health and safety and attracting industrial development to Louisiana, respectively. In addition, an interpretation of art. 1, section 4(H)(1) obligating government to offer expropriated health and safety property back to its former owner at the property's current value both returns the property to the very individual who allowed it to deteriorate, and accords that owner a windfall when, as frequently occurs, government's cost of removing the harm exceeds the property's current value.

19. Malone v. Shyne, 937 So.2d 343, 352 (La. 2006).

20. Archived Broadcasts of House of Representatives Civil Law Committee Meeting, May 2, 2006, at 3:17, *http://house.louisiana.gov/rmarchive/Ram/RamMay06/0502_06_CLP.ram* [hereinafter 5/2 Proceeding] (testimony by Brian Blaesser, Attorney, National Association of Real Estate Boards).

21. Malone v. Shyne, 937 So.2d 343, 353 (La. 2006).

22. See Archived Broadcasts of the House of Representatives Civil Law Committee meeting, March 21, 2006, *http://house.louisiana.gov/rmarchive/Ram/RamMar06/0321_06_CLP.ram* [hereinafter 3/21 Proceeding]; 5/2 Proceeding, supra note 20.

23. Broadcasts of the House of Representatives Floor Day 32, May 23, 2006, *http://house.louisiana.gov/rmarchive/Ram/*

RamMay06/06RS_Day32.ram [hereinafter 5/23 Proceeding].

24. Senate Committee on Judiciary A Minutes, 2006 Reg. Sess. (La. April 4, 2006) [hereinafter 4/4 Proceeding].

25. Malone, 937 So.2d, at 352.

26. See *infra* notes 36-44 and accompanying text.

27. 182 So.2d 725 (La. 1938).

28. *See*, *e.g.*, Hous. & Redev. Auth. of City of St. Paul v. Greenman, 91 N.W.2d 673 (Minn. 1959); N.Y. Hous. Auth. v. Mueller, 1 N.E.2d 153 (N.Y. 1936).

29. *See*, *e.g.*, Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1 (Ill. 2002); Beach-Courchesne v. City of Diamond Bar, 80 Cal. App. 4th 388, 95 Cal. Rpt.2d 265 (Cal.2d Dist. 2000); Hogue v. Port of Seattle, 341 P.2d 171 (Wash. 1959); Opinion of the Justices, 152 Me. 440 (Me. 1957; In Re Opinion of the Justices, 126 N.E. 2d 547 (Mass. 1955). Three Louisiana appellate opinions have sustained economic development alone as a public purpose. See cases cited *infra*, note 33.

30. The cases are collected in Ilya Somin, "Is Post-*Kelo* Eminent Domain Reform Bad for the Poor," 101 Nw. L. Rev. 1931, 1936 n. 30 (2007).

31. *Id.* at 1935.

32. Representative Bruneau unquestionably spoke for all of the amendments' sponsors and supporters when, at the 5/23 Proceeding, *supra* note 23, he stated that "[a]bsent *Kelo*, we wouldn't be here today . . . " (at 3:16); that the amendments are "a response to *Kelo*. [Their] purpose is against expropriation for economic development for transfer to a third party" (at 2:57); and that "[w]e is strictly talking about the economic development mode. I wish we didn't have the *Kelo* case, and if we didn't have the *Kelo* case, you wouldn't have a problem." (At 2:20).

33. Direct endorsement of Justice O'Connor's rejection of the *Kelo* majority's support of the economic development goal is featured throughout the legislative proceedings. *See*, *e.g.*, 5/2 Proceeding, *supra* note 20, at 2:17 (The "core" of the lead amendment bill is "to prevent expropriation by a public entity of a person's property for economic development and flip that property to a third person") (Bruneau); at 2:21 (the lead bill "plac[es] a prohibition in the Constitution against expropriation for economic development." (Ansardi) [to which Representative Bruneau immediately added "if the property is sold to a third person."] Additional opposition to the pursuit of economic development untethered to removal of affirmative harms is expressed in, *e.g.*, 5/23 Proceeding, at 2:57 and 3:03 (Bruneau), at 2:09 (Strain); 5/2 Proceeding, *supra* note 20, at 2:30 (Strain); 4/4 Proceeding, *supra* note 24, at p. 2-3 (McPherson and Guillot).

Further confirmation that objections to expropriation in its *economic development*, not its *urban recovery/health and safety*, mode dominated the legislative proceedings took the form, first, of the amendment of Art. VI, Sec. 21 *but not of Art. 1, Sec. 4(b)(2)(c)*, to exclude the taking of homesteads; second, rejection of Representative Ansardi's effort to enable economic development districts to utilize eminent domain, see 5/23 Proceeding, at 3:36; and, third, the legislators' repeated objections to prior Louisiana appellate opinions that, like *Kelo*, declared that economic development was a public purpose. *See*, *e.g.*, 5/2 Proceeding, *supra* note 20, at 2:25 and 4:01 (McPherson); 5:23 Proceeding, *supra* note 23, at 3:13 (Bruneau). The opinions are New Orleans Exhibition Hall Auth. v. Missouri Pacific Rr. Co., 625 So.2d 1070 (La. App. 4 Cir. 1993) (validating expropriation of land for a convention center); Town of Vidalia v. Unopened Succession of Ruffin, 663 So.2d 315 (La. App. 3 Cir. 1995) (same); and City of Shreveport v. Chanse Gas Corp., 794 So.2d 962 (La. App. 2 Cir. 2001) (same).

34. Hence, Representative Strain's declaration that it "is wrong to do eminent domain and transfer to another simply because they can pay more taxes." 5/2 Proceedings, *supra* note 20, at 2:39. To like effect, *see*, *e.g.*, 5/23 Proceeding, *supra* note 23, at 2:14, 2:20, 3:03, 3:05 and 3:39 (Bruneau), at 2:14 (Townsend); 4/4 Proceeding, *supra* note 24, at p. 6 (McPherson and Gullet).

35. Health and safety property enjoyed privileged status throughout the entire legislative process. See 4/4 Proceeding, *supra* note 24, at p. 6 (Lenteni: cautioning that the amendments not be drafted so as to "impede the rebuilding of southwest Louisiana or the City of New Orleans"), and at p. 6 (McPherson: stresses that the amendment must include the eventual Sec. 4(B)(2)(c) and that the draftsmen were "dealing with the blighted property issue to ensure that [Sec. 4(B)(2)(c)] stays in"); 3/21 Proceeding, supra note 22, at 1:07 (Bruneau: section 4(B)(2)(c) covers "the New Orleans situation"), at 106 (Ansardi: "I want the record to be crystal clear [that section 4(B)(2)(c) covers blighted and abandoned property])", at 3:02 (Bruneau: stating that "It's *non-blighted* property that's the concern.") (emphasis added), at 1:28 (Carter: stating that he has "no objection to taking blighted, vacant property."). Even Scott Bullock, attorney for lead plaintiff (Susette Kelo) in the *Kelo* action and executive director of the Institute for Justice, the libertarian political action group supporting post-*Kelo* restrictions nationwide, affirmed the potency of section 49B)(2)(c) as an instrument for post-Katrina urban recovery. In his testimony in response to Representative Walker's direct question whether or not the amendments would impair or disable New Orleans' urban recovery efforts, Bullock responded that the amendments would "protect the rights of cities to do rebuilding in truly blighted areas that pose health and safety risks." 5/2 Proceeding, *supra* note 20, at 2:56.

36. 5/23 Proceeding, *supra* note 23, at 3:59.

37. *Id.* at 1:02.

38. *Id.* at 3:17.

39. 3/21 Proceeding, *supra* note 22, at 1:09.

40. 5/23 Proceeding, *supra* note 23, at 3:00.

41. *Id.* at 3:19.

42. 3/21 Proceeding, *supra* note 22, at 1:26.

43. See nn. 33 & 34 *supra*.

44. See note 35 *supra*.

45. 5/2 Proceeding, *supra note* 20, at 2:17 (emphasis added). Representative Bruneau returned to this carefully linked three-part formulation — expropriation, economic development and private transfer — throughout the proceedings. Twenty-one days later on the House Floor, for example, he reasserted that the amendments' purpose is "to protect the right of property against expropriation *for economic development by transfer to a third party."* 5/23Proceeding, *supra* note 23, at 2:57) (emphasis added).

46. 5/2 Proceeding, supra at note 20, at 2:18.

47. See note 12 supra.

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