The Legislature’s Forward Pass to the Judiciary

By John J. Costonis

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 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” because it disagreed with the United States Supreme Court’s majority in *Kelo v. City of New London,* 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. 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. 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.”

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”).

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-
“Economic 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, “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. 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.

“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.”

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. 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-
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.13

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”180 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 Committee22 and in the House’s Floor Proceedings23 and the more summary minutes of hearings conducted by Senate Committee on Judiciary A24 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 engraven its endorsement of health and safety-based private transfers. Other legislators, of course, excoriated takings for economic development purposes,³⁶ while repeatedly embracing section 4(B)(2)(c) takings.³⁷ 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.”³⁵ This

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, for example, excoriated takings for economic development purposes,³³ while repeatedly embracing section 4(B)(2)(c) takings.³⁷ 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.

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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 faltering. 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 transferring expropriated blighted property to a private entity, Habitat for Humanity.


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).


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.


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.


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.


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.


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. I, Sec. 4(b)(2)(c), to exclude the taking of homes; 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., 5/22 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. Chasse 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.” 5/22 Proceeding, 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 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 reassured that the amendments’ purpose is “to protect the right of property against expropriation for economic development by transfer to a third party.” 5/23 Proceeding, supra note 23, at 2:57 (emphasis added). 46. 5/2 Proceeding, supra note 20, at 2:18. 47. See note 12 supra.

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