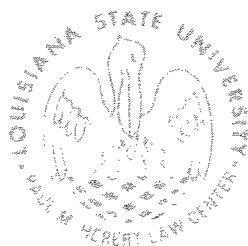


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A Whole New Ballgame: Coastal Restoration,
Storm Protection, and the Legal Landscape After Katrina

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A Whole New Ballgame: Coastal Restoration, Storm Protection, and the Legal Landscape After Katrina

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Prior to Hurricanes Katrina and Rita in 2005, it was already clear that the collapse of coastal Louisiana, which had seen roughly 1.5 million acres of coastal wetlands converted to open water, was not just an environmental problem but a matter vital to the protection and survival of the region. The storms, which claimed another 217 square miles of land, put the role of coastal wetlands and barrier shorelines as vital components of hurricane defense into stark focus. The physical, cultural, and economic landscape has been transformed and is now the subject of intense federal, state, and local efforts to recover from the storms and chart a new course for the future. Not unexpectedly, the focus of the recovery planning has been on the physical landscape of the coast. How much land was lost? Where can levees and wetlands best be built and maintained? How and where should communities rebuild?

That focus is understandable and important, but it is incomplete. There is another dimension, another landscape that must be dealt with if the full range of recovery opportunities and constraints is to be understood. I am speaking of the legal landscape. Quite simply, Louisiana's coastal lands and waters are not a blank canvas just waiting to be painted with a new generation of programs and projects. They are largely under the control or jurisdiction of a number of public and private players who are charged with operating or managing those resources for certain specific purposes such as navigation, fresh water supply, fisheries, oil and gas development, or flood protection. The laws and policies that drive the management of those coastal resources do not change or go away simply because new plans and expectations have arisen. Accordingly, it is as vital to have a firm grip on the legal landscape that shapes resource management decisions as it is to understand the ecological and geopolitical landscapes. They are

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all equally real. Just how real and how important is the subject of this article.

I. A BRIEF HISTORY

Coastal Louisiana is a very special place. Formed directly or indirectly by the Mississippi River over thousands of years, the nearly four million acres of estuaries, wetlands, and barrier shorelines that came into the possession of the United States in 1803 have been viewed variously as a wasteland and a treasure. To be sure, this netherworld between terra firma and water has been a challenging place to live and work, but it has also been an area of central importance to our nation's strategic, commercial, cultural, and ecologic interests. It is no stretch to say that geographer Peirce Lewis' description of New Orleans as a place that was "impossible but inevitable"¹ could apply to many of the human activities in coastal Louisiana as a whole. But coping with the challenges presented by America's greatest river and a naturally dynamic coast was not just a matter of science and engineering; it required a framework, a legal framework, to set it all in motion. Indeed, the very founding of New Orleans was an act intended to support France's legal claim of sovereignty over the Mississippi River and much of the central portion of what was to become the United States. Since then, virtually all of the management or mismanagement of the waters and wetlands of this region has occurred under the color of law, both state and federal. Those laws have governed the ownership, use, and management of our lands and waters and in the process have shaped the Louisiana we have inherited. It is no less true that they will now, just as surely, either enable or constrain the plans being drawn for the future.

Some of these laws are obvious, such as those that define public and private property rights, mandate environmental protection, or that authorize the specific undertakings like levees or navigation projects. Some are less obvious, such as those that control the duties and purposes of institutional actors, for instance,

1. CRAIG E. COLTEN, AN UNNATURAL METROPOLIS: WRESTING NEW ORLEANS FROM NATURE 2 (2005).

government agencies or private corporations. Whatever the case may be, it has been a legal regime that has driven and controlled the engineering, use, and exploitation of our coastal resources in the past, and that will continue to be the case in the future. As obvious as that last point may be to lawyers, it has been anything but in the realm of coastal restoration planning and hurricane protection. It has repeatedly been the case that the importance of understanding the legal side of coastal stewardship and storm protection has been recalled only after trouble was already at hand.

Unfortunately, law has been the junior partner of science, engineering, and politics when it has come to planning for the effective stewardship of Louisiana's coast and the protection of its communities. To be sure, there have been notable exceptions, such as the limited authorization of the state to negotiate the ownership of minerals on reclaimed coastal lands² and the constitutional amendments conforming Louisiana takings law with federal law for the purposes of coastal restoration and storm protection.³ By and large those exceptions prove the rule though, since they were all catalyzed by some significant event, such as an enormous judgment against the state or the prospect of litigation.⁴ As understandable as that may be in any specific case, the overall effect has been that state and federal laws (and their attendant policies) have done more to constrain—rather than facilitate—effective coastal conservation and restoration and hurricane protection efforts. Hurricanes Katrina and Rita provided the final proof of such constraint.

In many ways this comes as no surprise. After all, there is an inherent conservatism in the law that by design is intended to regulate the activities and relationships of society in a predictable and orderly fashion over time. Add to that the fact that most of the people working to plan and carry out the state and federal coastal conservation, restoration, and flood protection efforts are working for institutions with prescribed missions, authorizations, and budgets and whose job it is to “follow the law.” It becomes easy to

2. LA. REV. STAT. ANN. § 41:1702(D)(2)(a)(i) (2007).

3. See LA. CONST. art. VI, § 42; LA. CONST. art I, § 4(G).

4. See, e.g., *State v. St. Charles Airline Lands, Inc.*, 871 So. 2d 674 (La. App. 5th Cir. 2004).

see how the law, unlike science and engineering, comes to be seen as largely immutable—something that is just there. In calmer times that may be fine, but in times of trial, like these, one finds that laws do not always define the public interest and, indeed, can frustrate it.

An example of this frustration is the case of the Mississippi River Gulf Outlet (MRGO). The MRGO is a federal navigation channel that was dug through the swamps and marshes southeast of New Orleans to afford a shorter route for maritime traffic servicing the Port of New Orleans. Unfortunately, the benefits touted for the project largely failed to materialize, while the negative impacts of the project, wetlands loss, and the exposure to storm damage were delivered in spades. For years a growing chorus of voices called for the closure of the channel and the rehabilitation of the landscape. A substantial amount of time, energy, and money was spent discussing the science and engineering closure options, yet nothing happened. Even after Hurricane Katrina, to the astonishment of many, the Corps of Engineers continued to assume the MRGO would continue to be a feature of the landscape.

There was actually a very good reason for that assumption. The MRGO would remain a feature of the physical landscape because it was a feature of the legal landscape. Congress had told the Corps to construct and maintain the channel, and as long as it was legally authorized, it was its duty to plan around. It was not a question of science, engineering, public preference, or even good sense. It was a matter of law. Until that was understood and addressed, those asking the Corps to contemplate a future without the MRGO were asking it to do something it did not believe it could do legally. That linkage was finally made by the Governor's Advisory Commission on Coastal Protection, Restoration, and Conservation, which ultimately led to Congress directing the Corps to develop a closure plan for the MRGO.⁵

The MRGO is not an isolated situation. Increasingly, the ease or difficulty of saving Louisiana's coast and protecting its communities will turn on just how tailored our laws are to making our best plans affordably implementable.

5. EMERGENCY SUPPLEMENTAL APPROPRIATION FOR THE GLOBAL WAR ON TERROR AND HURRICANE RECOVERY, H.R. Rep. No. 109-234 (2006).

To some degree, the state has begun to recognize this need. Since the storms of 2005, the state has moved to integrate its coastal conservation and restoration efforts with its storm and flood protection efforts.⁶ It has also moved to consolidate, to a greater extent, local levee boards in the greater New Orleans area. Indeed, the state's recently completed Comprehensive Master Plan for a Sustainable Coast (April, 2007)⁷ explicitly recognizes that the future of the state as a cultural, economic, and ecologic entity depends on the integration of structural flood protection, wetland and barrier shoreline restoration, and nonstructural measures such as land use controls. The Master Plan and the corresponding federal effort led by the U.S. Army Corps of Engineers are laying the foundation for a vast public works and resource conservation effort with a price tag in the tens of billions of dollars. There will be three main aspects to those efforts: (1) structural flood protection, (2) wetland and barrier island restoration, and (3) nonstructural flood protection.

The first two categories will involve public works on a large scale. They will also take years to authorize, design, and build. The third category, nonstructural protection, has garnered much less attention but can make an appreciable difference in the short run. This category covers such measures as land use controls, building codes, wetland conservation, public education, and evacuation planning.

None of these categories of action is completely distinct. They can and are intended to work together to produce a more comprehensive suite of public benefits. They will also confront three critical, and related, legal issues: (1) property ownership, (2) land use, and (3) takings.

The manner in which those issues are dealt with may well determine the level of success of the state and federal efforts to restore and revitalize the coast and its communities.

6. *See generally* 2005 La. Acts No. 8.

7. COASTAL PROT. & RESTORATION AUTH. OF LA., INTEGRATED ECOSYSTEM RESTORATION AND HURRICANE PROTECTION: LOUISIANA'S COMPREHENSIVE MASTER PLAN FOR A SUSTAINABLE COAST (2007) [hereinafter MASTER PLAN].

A. Property Ownership

The ownership of land in coastal Louisiana has always been a bit problematic. In geologic terms, the area is less a place than a process, a process of land building and retreat that defies our normal notions of land as a solid, permanent thing. The definitions of and boundaries between what is private and what is public are not precise and can be altered. Despite years of effort by Louisiana courts and lawmakers to provide greater clarity, the simple fact of the matter is that, in practice, a degree of uncertainty is the order of the day.⁸ This has not been helped by the fact that, for years, the state did not attempt to identify or assert its ownership claims in any coherent manner.

It was on that chaotic landscape that Hurricanes Katrina and Rita made landfall. With over two hundred square miles of land being converted to open water and the need to urgently begin coastal restoration and hurricane protection efforts on a vast scale, the question of who owns what will have to be dealt with much more forthrightly. At least in the case of coastal restoration projects, the state's practice has been to handle real estate issues on a project-by-project basis and then, generally, only after a project is at or near the point where it is authorized for construction. That approach may have worked for the more modestly paced and scaled effort that preceded Katrina but it will almost certainly guarantee the delay, increased cost, and perhaps even failure of the work needed after Katrina as envisioned by the state's Master Plan.

Even if the state takes on this challenge it will be no easy task for two reasons. First, the coast itself is dynamic: what is land today may be open "navigable" water tomorrow and what is water today may become land. Second, whatever precision may appear to exist in the printed text of a statute tends to dissolve when applied to our coastal landscape. Terms such as navigable, inland waters, seashore, and arm-of-the-sea tend to lose their meaning in a collapsing landscape and in areas of induced land building such as the Atchafalaya Delta. The general rules governing land ownership in Louisiana are well known and have been discussed at

8. See, e.g., LA. REV. STAT. ANN. §§ 9:1115.1-3 (2007).

length before.⁹ It is applying those rules to a coherent effect that is the challenge. Coastal lands generally fall into one of the following four categories—public lands, private lands, public lands burdened by a private right, or private lands subject to some public use.

- Public lands are those owned outright by the state or some other governmental area and areas such as navigable water bottoms.
- Public lands burdened by a private right would include state lands that are subject to an affirmative private property interest, such as a lease, or an inchoate private right, like the right to reclaim eroded lands.
- Private lands subject to public use include areas burdened by public leases and servitudes. These public rights can be created by contract, gift, or by operation of law, as is the case with river banks (including land built by alluvion or dereliction).
- Private lands are lands owned by private parties that do not fit into any of the previous categories.

The classification of a given tract of land can make a big difference when it comes to planning for the future of the coast. It matters in terms of who is entitled to use and access those lands. It matters in terms of the time and expense that coastal restoration and storm protection planners must anticipate in regard to acquiring the rights necessary to plan, construct, operate, and maintain the vast array of projects now being contemplated. It matters in terms of tax rolls and liability. And it matters in terms of who has rights to the revenues from those lands and the minerals beneath them.

By way of illustration, consider the coastal restoration plans devised by the state and the Army Corps of Engineers before Katrina and Rita. The cost of a “near term” plan for restoring the coast was set at around \$1.9 billion. Of that amount, nearly \$387 million, or roughly twenty percent, was related to securing land-

9. See, e.g., Judith Perhay, *Louisiana Coastal Restoration: Challenges and Controversies*, 27 S.U. L. REV. 149 (1999); Marc Hebert, *Coastal Restoration Under CWPPRA and Property Rights Issues*, 57 LA. L. REV. 1165 (1997).

rights.¹⁰ It would also be the responsibility of the non-federal partner—in this case the state of Louisiana—to secure those rights. That is no small undertaking.

All of this begs for a robust, forward-looking approach to identifying the lands, waters, and water-bottoms to which the state and its political subdivisions have rights and for acquiring whatever additional rights they need. This is a very different scale and focus than has been characteristic of state efforts in the past. The Louisiana State Land Office was struggling to keep pace with these issues of ownership and access even before Katrina and Rita, a fact recognized by the Louisiana legislature in 2004. At that time the legislature declared that “proper identification and inventory of water-bottoms, and their boundaries and title, is urgent and critical to all citizens of the state of Louisiana” and directed the State Land Office to complete an inventory of water-bottoms within four years.¹¹ What was urgent before the storms of 2005 is even more so and more difficult now. It is vital that the state provide the direction and resources necessary to complete and regularly update that inventory. To be sure, it will not solve all of the problems in this realm but it will go a long way toward providing greater clarity about just what rights the state has and what it may yet need to acquire.

B. Land Use

Land use patterns in Louisiana have been shaped by a number of social and economic factors over the years. Residential development, industrial siting, and transportation infrastructure, such as highways, bridges, and canals, all too often took root without any apparent recognition of how those things might affect one another, the environment, or the well-being of the broader public. In short, land use planning and land use were not necessarily related concepts. Katrina and Rita made clear that there is a price for that approach to development; just how clear can be seen by evaluating the New Orleans metropolitan area.

10. 1 U.S. ARMY CORPS OF ENG'RS, LOUISIANA COASTAL AREA (LCA), LOUISIANA ECOSYSTEM RESTORATION STUDY: MAIN REPORT, at MR 4-57 (2004).

11. See S. Con. Res. 25, Reg. Sess. (La. 2004).

In 1960, prior to Hurricane Betsy, desegregation, and the opening of the MRGO, the population of New Orleans was 627,585 with an average density of 3,157 people per square mile.¹² By 2000, those figures had dropped to 484,674 and a density of 2,677 people per square mile.¹³ At the same time the surrounding parishes were gaining population. Clearly, there was a spreading of the population from New Orleans to outlying areas. Whatever the reasons for that might have been, one clear result was the need to cast the hurricane protection net wider, at least on the south shore of Lake Pontchartrain.¹⁴ Unfortunately, the resource base for planning and constructing those facilities did not expand in pace with the population. This contributed to flood protection being divided among a plethora of federal, state, and local entities with the lamentable result of a lower level, and evidently lower quality, of protection for a large but dispersed population, instead of a higher level of protection for more concentrated communities.

One of the most encouraging features of the state Master Plan is its recognition of the need to make land use planning, building codes, and evacuation planning central features of the state's integrated approach to protecting lives, communities, and the culture of the region. The plan makes a number of references to the need to prevent development in wetland area, foster sustainable coastal forests, and strictly enforce land use controls.¹⁵

As strong as this language is, it is largely aspirational and dependent on local governments to enact and "strictly enforce" land use and zoning regulations.¹⁶ Given that many local governments lack any meaningful land use planning authority or the resources to more aggressively pursue planning and

12. Campbell Gibson, *Population of the 100 Largest Cities and Other Urban Places in the United States: 1770 to 1990* tbl.19 (U.S. Bureau of the Census, Population Division Working Paper No. 27, 1998), available at <http://www.census.gov/population/www/documentation/twps0027.html> (follow "19." hyperlink).

13. U.S. Census Bureau, State and Country QuickFacts, <http://quickfacts.census.gov/qfd/states/22/22071.html> (last visited Oct. 18, 2007).

14. The reasons for the exclusion of St. Tammany Parish from that protection are beyond the scope of this article.

15. MASTER PLAN, *supra* note 7, at 32, 53, 59, 78, 80–81.

16. *Id.* at 53.

enforcement, it is essential for the state to take stock of that fact and develop specific actions to address it. Presently, the plan calls for the state to provide incentives to local governments to enact region-wide land use zoning but does not indicate what those might be or what the state will consider doing if the incentives are not sufficient. The state currently has laws to enable local planning and zoning but they do not mandate it nor do they provide any guidance as to what the elements of a local plan might be.¹⁷ If the state wants effective land use planning and zoning to be the basis for preventing future development in harm's way or in areas to be affected by some of the large-scale hurricane protection or coastal restoration projects envisioned by the Master Plan, then much more will be needed.

Another major land use issue that will almost certainly take on greater importance is that of what role the state and federal governments can and should play in preventing inappropriate development and in conserving the state's wetland resources. Both the state and the federal governments have regulatory programs that are supposed to restrict development in areas that are jurisdictionally "wet." The main programs on the state level are the Coastal Management Program administered by the Department of Natural Resources and the Department of Environmental Quality's water quality certification program.¹⁸ On the federal side, the dominant regulatory programs are those sanctioned by section 404 of the Clean Water Act and section 10 of the River and Harbors Act of 1899. Both programs are administered by the Army Corps of Engineers.

Surprisingly, these regulatory functions have not received much attention in the state and federal efforts to plan for the future safety and sustainability of the coast. The Master Plan has only one reference to the state's Coastal Zone Management Program, where it calls for strengthening the program.¹⁹ As necessary as that might be, there is no discussion of what that program should

17. See, e.g., Stephen D. Villavaso, *Planning Enabling Legislation in Louisiana: A Retrospective Analysis*, 45 LOY. L. REV. 655 (1999).

18. Both of these programs have their roots in federal law: the Coastal Zone Management Act in the case of the Coastal Management Program, and section 401 of the Clean Water Act in the case of water quality certification.

19. See MASTER PLAN, *supra* note 7, at 78.

be doing now or what improvements might be needed. Surely, the state must have some idea of how both the current and improved programs might help achieve the Master Plan's objectives.

The Army Corps of Engineers' preliminary Louisiana Coastal Protection and Restoration report was even quieter.²⁰ The Corps has recognized the need to restrict development in wetland areas and has noted the importance of such "nonstructural" measures as local zoning, building codes and land acquisition, evacuation planning, and education in reducing storm risk.²¹ Notably missing from that list is its regulatory authority under the Clean Water Act and the River and Harbors Act.

If ever there was a time for the coordinated application of the Corps' and the state's regulatory functions, one would think that this is it. For years that function has been lacking a clear purpose and the resources necessary to be robustly and professionally conducted. If properly managed and integrated, those existing regulatory authorities could be used to protect the public interest, reduce the risk to life and property, reduce the risk of exposure to takings claims by helping to define a purposeful public interest and shape private investment expectations, and ultimately make the cost of coastal protection and restoration more affordable in terms of time and money.

These are not abstract points. Applications continue to be filed with the state and the Corps for projects that would convert coastal wetlands to other uses and increase the number of people and homes and businesses in areas still lacking significant storm protection. The manner in which such cases are handled will be illuminating as to the ability and willingness of federal, state, and local government to implement what seems to be a bedrock tenet of the state Master Plan.

The importance of using existing authorities and identifying what more is needed goes beyond the issue of discouraging "at risk" development or conserving wetlands. It goes to the state's bottom line. It has been made clear in recent jurisprudence that the

20. See U.S. ARMY CORPS OF ENG'RS, LOUISIANA COASTAL PROTECTION AND RESTORATION PRELIMINARY TECHNICAL REPORT TO UNITED STATES CONGRESS (2006).

21. *Id.* at 38-39.

record of the Department of Natural Resources and the Army Corps of Engineers of approving nearly all permit requests for development in coastal waters and wetlands has been a factor in rulings against the state and local levee districts in takings cases connected with the provision of vital public services such as hurricane protection.²² Additionally, continued development of wetland areas, particularly in light of the uncertain and checkered experience with mitigation, could have a direct impact on the state's cost sharing burdens under the Coastal Wetlands, Planning, Protection, and Restoration Act (CWPPRA). The state's cost sharing percentage dropped from twenty-five percent to fifteen percent under CWPPRA as a result of the Conservation Plan, the purpose of which is to ensure that there is no net loss of wetlands in the state's coastal zone due to development. The ability to effectively regulate such development is directly tied to the state's pocketbook.

C. Takings

Given the scale of the landscape in play in the Master Plan, roughly three million acres, and the scale of the projects and programs that will be needed to restore some sense of functional stability to the region, it is easy to see how daunting the prospect is of dealing with takings claims at that scale. This is all the more daunting because the state has largely dealt with the takings issue in this realm by seeking to avoid rather than to understand and manage it. Further, because Louisiana law had been more restrictive of government action than federal law, the immediate impact of the Supreme Court's landmark decision in *Lucas v. South Carolina Coastal Council*²³ was less dramatic until recently. Accordingly, Louisiana is dealing with these issues not only through the lens of *Lucas* and its own constitution and jurisprudence but also in the context of the need for urgent action to facilitate the very survival of the region.

22. See *State v. St. Charles Airline Lands, Inc.*, 871 So. 2d 674, 683-84 (La. App. 5th Cir. 2004).

23. 505 U.S. 1003 (1992).

In Louisiana, as in all states, the relationship between government and private property is complex. It is simultaneously symbiotic and adversarial. On the one hand government defines, creates, protects, and even encourages private property rights. On the other hand, government often must limit, curtail, infringe, or extinguish private rights in the conduct of its essential public purposes.

The dual nature of this relationship inevitably leads to tension and cases of confusion and conflict. That is particularly true when the role and scope of governmental action are changing: in other words, in times like these. Though it is probably impossible to eliminate the potential for conflict, good planning and a sound understanding of the applicable laws can go a long way to reducing both the frequency and severity of any conflicts. Any effort to revamp or expand land use planning law and practice in Louisiana should be approached with that firmly in mind.

The prohibition against governmental takings is rooted in both the Federal and State Constitutions. The Fifth Amendment to the U.S. Constitution, made applicable to the states via the Fourteenth Amendment, provides that: "No person shall . . . be deprived of life, liberty or property without due process of law; nor shall private property be taken for public purpose, without just compensation."

The Louisiana constitution states, in pertinent part:

Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.

Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. . . .

. . . .

In every expropriation or action to take property pursuant to the provisions of this Section . . . the owner shall be compensated to the full extent of his loss. Except as otherwise provided in this Constitution, the full extent of the loss shall include, but not be limited to, the appraised

value of the property and all costs of relocation, inconvenience, and any other damages actually incurred by the owner because of the expropriation.²⁴

The latter provision makes three things very clear. First, there is an affirmative right to own property. Second, property owners are entitled to compensation if their property is taken or damaged by the state or its political subdivisions. And third, the right to own property is subject to reasonable statutory restrictions and exercises of police powers.

Generally speaking there are two types of actionable takings—those that involve the physical dispossession of the private property owner and those that so reduce the value and use of the property as to constructively constitute dispossession. This latter class of takings is referred to as “regulatory takings,” “inverse condemnation,” or (at least in Louisiana in certain circumstances) “appropriation.”²⁵ This is the category of takings that arises from

24. LA. CONST. art. I, § 4.

25. Though it might not be clear from the language of section 4, the jurisprudence leaves no doubt that in cases where governmental bodies take or damage private property without first exercising eminent domain, they can be sued to recover for that taking. Such situations are called “inverse condemnation” or “appropriation,” to distinguish them from direct expropriation via eminent domain. It is this aspect of the law that often comes into play when zoning or other governmental land use controls are put to use.

The authority of government (and certain corporations and limited liability companies) to take or expropriate property is implicit in the Louisiana Constitution, LA. CONST. art. I, § 4, and explicit in the Louisiana Revised Statutes, LA. REV. STAT. ANN. § 19:2 (2007). Specific procedures are set forth for exercising that authority. § 19:2.2; LA. REV. STAT. ANN. §§ 48:441–42 (2007). Because there are instances in which public bodies in fact take or damage private property without having first gone through an expropriation proceeding, the courts have created the concept of inverse condemnation to ensure that there is some proceeding available for the affected property owner to seek redress. *See State Through the Dep’t of Transp. & Dev. v. Chambers Inv. Co.*, 595 So. 2d 598, 602 (La. 1992); *Reymond v. State Through the Dep’t. of Highways*, 231 So. 2d 375, 383 (La. 1970), *overruling recognized by Ursin v. New Orleans Aviation Bd.*, 506 So. 2d 947 (La. App. 5th Cir. 1987); *Roy v. Belt*, 868 So. 2d 209, 214 (La. App. 3d Cir. 2004).

Despite the fact that inverse condemnation is not defined or expressly provided for in either the Civil Code or the Louisiana Revised Statutes, it is clear that the right of action is not a mere judicial construction. Rather, Louisiana courts have recognized that the action for inverse condemnation is an

land use controls and regulation of the sort discussed here. For convenience we refer to these as “regulatory takings” for the purpose of this discussion.

Though Federal Fifth Amendment jurisprudence has been instructive to Louisiana takings jurisprudence generally, regulatory takings under Louisiana law have been governed by the distinctive standards of the Louisiana Constitution that control land use and regulatory actions by the state and its political subdivisions. At least that has been the case until recently. In 2003 and 2006 Louisiana amended article I, section 4 of its constitution and passed attendant legislation to provide that in the case of property rights “affected by coastal wetlands conservation, management, preservation, creation, or restoration” or “lands and improvements actually used or destroyed in the construction, enlargement, improvement, or modification of federal or non-federal hurricane protection projects, including mitigation related thereto” that compensation shall not exceed that required under the Fifth Amendment.²⁶

attribute of the self-executing nature of the Louisiana Constitution’s requirement that the government pay just compensation when it takes or damages private property. *See Chambers*, 595 So. 2d at 602; *St. Tammany Parish Hosp. Serv. Dist. No. 2 v. Schneider*, 808 So. 2d 576, 582 (La. App. 1st Cir. 2001). It is also clear that the elements of an inverse condemnation (or appropriation) case are the same as those in an expropriation case. These are:

- A recognized species of property right must have been affected,
- The property right must have been taken or damaged in a constitutional sense, and
- The taking or damaging must be incidental to acts by the public body in pursuit of a public purpose.

See Chambers, 595 So. 2d at 603; *Holzenthal v. Sewerage & Water Bd. of New Orleans*, 950 So. 2d 55, 63 (La. App. 4th Cir. 2007.), *writ denied*, 953 So. 2d 71 (La. 2007).

26. *See* LA. CONST. art. I, § 4(F)–(G); LA. CONST. art. VI, § 42; LA. REV. STAT. ANN. § 49:213.10 (2007). Though the effect of these changes is largely the same, they are not identically created. The requirement that compensation arising in the hurricane protection levees “not exceed the compensation required by the Fifth Amendment” is made explicit in Louisiana Constitution article VI, section 42 and Louisiana Constitution article I, section 4(G). The compensation limits for coastal restoration, etc., are enabled by Louisiana Constitution article I, section 4(F) but spelled out in Louisiana Revised Statutes section 49:213.10,

Since it is clear that a regulatory land use program can trigger compensable takings,²⁷ the key questions become (1) if and when a given program effects a compensable taking and (2) what is the amount of compensation due?

II. WHAT IS AN ACTIONABLE REGULATORY TAKING?

The question of just what constitutes a regulatory taking is less precise than most might expect. The entire concept of regulatory takings only dates back to 1922 in Justice Holmes's opinion in *Pennsylvania Coal Co. v. Mahon*.²⁸ In recapping the legal history of regulatory takings in his majority opinion in *Lucas*, Justice Scalia candidly noted that "we have generally eschewed any 'set formula' for determining how far is too far, preferring to 'engag[e] in . . . essentially ad hoc, factual inquiries.'"²⁹

The fact that Louisiana has, at least since 1974, had a very different definition of what is a taking does not make things any easier. Because Louisiana now follows its traditional takings laws in some situations and the federal approach in others, it is important to have a basic understanding of both, including how and when they will be applied.

A. Regulatory Takings Under Louisiana Law

Louisiana follows the modern rule that the law protects the right to use and enjoy a thing or land, not just the physical sanctity of the object itself. Put another way, the legal term "property" refers not just to an object but to the rights that exist with respect to the object.³⁰ When a substantial interference is imposed upon the free use and enjoyment of property, a compensable taking may arise under Louisiana law regardless of whether expropriation

which provides "[c]ompensation . . . shall be governed by and strictly limited to the amount and circumstances required by the Fifth Amendment."

27. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

28. 260 U.S. 393 (1922).

29. *Lucas*, 505 U.S. at 1015 (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

30. *Chambers*, 595 So. 2d at 601.

proceedings have been initiated, as in the regulatory takings context.³¹ It is clear that regulatory land use actions such as zoning or rezoning may result in a taking.³² It is also clear that a compensable taking *does not* occur merely because a property owner is unable to develop his property to its maximum economic potential.³³ Whether a taking has occurred in a given case depends on three factors: First, is a legally recognized private property right affected? Second, has that property right been taken or damaged? Third, was the taking or damaging for a public purpose? All three factors must be met for a compensable taking or damaging to have occurred.³⁴

The first prong of this three part test requires a showing of some legal status that runs with the property.³⁵ This can be an ownership interest, a leasehold, or a servitude; however, a mere user or possessor of property may not bring an inverse condemnation claim.³⁶ Under federal law there is a requirement that the property interest be supported by a "distinct investment-backed expectation[]," but that is generally not the case under Louisiana law.³⁷ This can lead to, and has in the past led to, takings cases proceeding under Louisiana law that would not be allowed under federal law.³⁸ That disparity is one of the reasons for the recent changes to the Louisiana Constitution to bring Louisiana and federal takings law into harmony for hurricane

31. *Id.* at 602.

32. *See* *Standard Materials, Inc. v. City of Slidell*, 700 So. 2d 975, 984 (La. App. 1st Cir. 1997); *Layne v. City of Mandeville (Layne I)*, 633 So. 2d 608, 610 (La. App. 1st Cir. 1993), *writ denied*, 635 So. 2d 234 (La. 1994), *aff'd*, 743 So. 2d 1263 (La. App. 1st Cir. 1999), *writ denied*, 754 So. 2d 966 (La. 2000).

33. *See Standard Materials*, 700 So. 2d at 984 (citing *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994)); *State Dep't of Soc. Servs. v. City of New Orleans*, 676 So. 2d 149, 154 (La. App. 4th Cir. 1996).

34. *Chambers*, 595 So. 2d at 603.

35. *Layne v. City of Mandeville*, 743 So. 2d 1263, 1268 (La. App. 1st Cir. 1999).

36. *Id.*

37. *Compare Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 105 (1978), with *Avenal v. Louisiana (Avenal I)*, 757 So. 2d 1, 6 (La. App. 4th Cir. 1999) (citing *La. Seafood Mgmt. v. La. Wildlife & Fisheries Comm'n*, 715 So. 2d 387, 393 (La. 1998)).

38. *Avenal I*, 757 So. 2d at 6.

protection and coastal conservation and restoration projects, projects increasingly likely to be partnered with the federal government.³⁹

The second prong is a question of fact based on whether the governmental act “destroyed a major portion of the property’s value or eliminated the practical economic uses of the property.”⁴⁰ The third prong is also fact-dependent, but jurisprudence indicates that actions taken to reduce flooding risk are “manifestly evident” of a valid public purpose.⁴¹ Though *Holzenthal* involved a drainage project, there seems little doubt that regulatory actions taken to avoid or abate flooding or other risks would be no less evident as a public purpose. This conclusion is supported by the well-established principal that the authority to zone flows from the government’s police power and that there is a presumption that zoning ordinances are valid.⁴² Given the statements made in the state Coastal Master Plan about the importance of land use planning and non-structural approaches to managing risk in coastal Louisiana, it seems clear that the enhanced use of zoning and similar development controls under the Coastal Zone Management for the purpose of safeguarding life and property and in facilitating the conservation and restoration of the coastal landscape would be a manifestly evident public purpose.⁴³

B. Regulatory Takings Under Federal Law

Two discrete categories of regulatory takings have been recognized that give rise to a categorical obligation to compensate without requiring any specific factual inquiries about the particular

39. See LA. CONST. art. I, § 4(F)–(G); LA. CONST. art. VI, § 42; see also LA. REV. STAT. ANN. § 49:213.10 (2007).

40. *Layne v. City of Mandeville (Layne I)*, 633 So. 2d 608, 612 (La. App. 1st Cir. 1993) (citing *Lakeshore Harbor Condo. Dev. v. New Orleans*, 603 So. 2d 192 (La. App. 4th Cir. 1992)), *writ denied*, 635 So. 2d 234 (La. 1994), *aff’d*, 743 So. 2d 1263 (La. App. 1st Cir. 1999), *writ denied*, 754 So. 2d 966 (La. 2000).

41. *Holzenthal v. Sewerage & Water Bd. of New Orleans*, 950 So. 2d 55, 66 (La. App. 4th Cir.), *writ denied*, 953 So. 2d 71 (La. 2007).

42. *Palermo Land Co. v. Planning Comm’n of Calcasieu Parish*, 561 So. 2d 482, 491 (La. 1990).

43. See, e.g., MASTER PLAN, *supra* note 7, at 68, 105.

case. The first is regulations that require a landowner to suffer a permanent "physical invasion."⁴⁴ The second is regulations that deny all economically beneficial or productive use of the land.⁴⁵ It is this second category of takings that comes into play in the context of land use and hazard mitigation regulations of the sort discussed in this report. Understanding the scope and bounds of federal takings law has taken on a sense of urgency and importance since the adoption of the federal standard for hurricane protection and coastal restoration and conservation projects. The basic elements of a regulatory takings claim under federal law are well established, if not entirely clear.

The third category involves situations in which some, but not all, of the beneficial or productive use of the land is denied. In such cases, compensation *may* be due based upon a balancing of the public interest involved, the economic impact of the regulation on the property owner, and the extent to which the regulation interferes with the property owner's investment-backed expectations.⁴⁶ Generally speaking, the sort of land use measures we are considering would fall under either the second or third categories of claims. Despite the apparent clarity of these rules, they are anything but precise in their application.⁴⁷ Questions about the nature and extent of the property interest at issue continue to arise, as does the source and nature of the "police power" being asserted through land use regulation. Even under *Lucas*' first two categories, compensation may not be due if the property interest at stake is subject to a traditional public interest constraint such as nuisance law or the need to protect public welfare as a matter of necessity.⁴⁸ In short, in such cases there is

44. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

45. *Id.*

46. *Id.* at 1016, 1019. *See also* *Layne v. City of Mandeville (Layne I)*, 633 So. 2d 608, 611 (La. App. 1st Cir. 1993), *writ denied*, 635 So. 2d 234 (La. 1994), *aff'd*, 743 So. 2d 1263 (La. App. 1st Cir. 1999), *writ denied*, 754 So. 2d 966 (La. 2000).

47. The majority opinion in *Lucas* admitted as much. In a footnote, Justice Scalia noted that "[r]egrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision" and that "[u]nsurprisingly, this uncertainty . . . has produced inconsistent pronouncements by the Court." *Lucas*, 505 U.S. at 1016 n.7.

48. *Id.* at 1024, 1028.

no abridgment of a private property right because the government reserved the right to act in those cases when the private property right was created.

As confusing as that may be, it actually fits well with some longstanding principles of Louisiana law. As noted above, article I, section 4 of the Louisiana Constitution expressly states that private property rights are not absolute but subject to reasonable exercises of police power and statutory restrictions.⁴⁹ Further, the notion that some property rights have been reserved by the state, at least in some situations, is fully consistent with the state's doctrine of appropriation, which has been explained as "the exercise of a pre-existing but previously unexercised public right."⁵⁰ It was that doctrine that historically allowed the construction of levees along the Mississippi River without any duty to compensate landowners.⁵¹ In coastal Louisiana the application of hazard mitigation driven zoning laws would fall largely on the wetter regions of the coast—its swamps and marshes. In that context, the potential for triggering compensable takings claims seems very limited for three reasons. First, it seems doubtful that such rules would result in a complete denial of the economic uses of the land. Since most of these areas are not readily amenable to residential or commercial development without extensive levee building and drainage, their economic value has been rooted more in hunting, fishing, timbering, mineral extraction, and eco-tourism, all of which are activities that, within certain boundaries, would still be pursuable.

Second, most of this area is already pervasively regulated under the Clean Water Act, the River and Harbors Act of 1899, and the Coastal Zone Management Act, so the degree to which there is a reasonable investment-backed development expectation seems very limited.

Finally, there is a strong case that the importance of reducing risk exposure and restoring the coast has become a matter of such

49. See *supra* Part I.C.

50. *Vela v. Plaquemines Parish Gov't (Vela III)*, 811 So. 2d 1263, 1268 (La. App. 4th Cir. 2002) (quoting *Vela v. Plaquemines Parish Gov't (Vela II)*, 729 So. 2d 178, 181 (La. App. 4th Cir. 1999)).

51. *Eldridge v. Trezevant*, 160 U.S. 452 (1896).

pressing urgency that hazard mitigation driven land use controls are a matter of public necessity under the state's police power. This was addressed in *Avenal v. State (Avenal III)*⁵² by the Louisiana Supreme Court in response to a claim that the operation of the Caernarvon coastal restoration project had resulted in a taking under the Fifth Amendment of the U.S. Constitution. The court dispensed with that claim, noting that even if the project "did entirely deprive them of all economically beneficial and productive use of their property rights, the plaintiffs are still not entitled to compensation as Caernarvon was a *valid exercise of the state's police power under federal law.*"⁵³ In the context of the state and federal efforts to develop comprehensive programs to restore the coast and protect lives, property and vital infrastructure, and programs that emphasize land use controls, there seems to be no basis for distinguishing between a river reintroduction project and land use controls that are part and parcel of the same program.

III. HOW MUCH COMPENSATION IS DUE?

Assuming that a land use regulation has caused a taking, the question becomes how much compensation is due. The answer to this question depends on whether Louisiana is applying its general takings law or federal law to the facts of each case. The difference can be significant.

In general, federal law requires only "just compensation" be paid, which has come to mean the fair market value of the "taken" property right.

Louisiana law is different and has changed over time. Presently, Louisiana law provides not only for "just compensation" but also for the affected property owner to be compensated "to the full extent of his loss."⁵⁴ As noted earlier, the Louisiana Constitution makes it clear that this is more than just the fair market value of the property.⁵⁵ It also includes all costs of relocation, inconvenience, and any other damages actually incurred. This clearly goes beyond what is required by the Federal

52. 886 So. 2d 1085, 1107-08 n.28 (La. 2004).

53. *Id.* (citing *Lucas*, 505 U.S. 1003 (emphasis added)).

54. LA. CONST. art. I, § 4(B)(5).

55. *See supra* Part I.C.

Constitution and even beyond what would be recoverable under Louisiana tort law.⁵⁶

Whether land use controls will be judged under the federal standard or the general Louisiana standard really depends on whether they are found to be an integral part of the state's hurricane protection efforts or its coastal wetlands conservation, management, preservation, creation, or restoration program. If either of these applies, then the federal standard would apply through the application of Louisiana Constitution article I, sections 4(F) and (G), article VI, section 42, and Louisiana Revised Statutes section 49:213.10. Given the state's priorities of reducing risk to life and property in its coastal region and preserving and restoring its coastal environment as set forth in the state's Master Plan, which was adopted unanimously by the legislature, it would seem a very strong case exists for finding that hazard mitigation focused land use regulations are to be analyzed under the federal standard. It would also seem that a strong case could be made in some instances that the need for such regulation is a matter of public necessity so as to obviate the need for compensation regardless of which standard is applied. Of course, the facts of each case will be largely determinative.

IV. CONCLUSION

Coastal protection and restoration have been the subject of growing interest over the past decade. Plans, projects, and programs have been initiated at the local, state, and federal levels that, if implemented, would reshape our coast and provide increased levels of storm protection for many of our coastal communities. Hurricanes Katrina and Rita cast the importance of saving our coast and improving storm protection in a new and more urgent light.

Since the storms, the Louisiana and federal governments have charged teams of scientists, engineers, and others with developing

56. See *State Through the Dep't of Transp. & Dev. v. Chambers Inv. Co.*, 595 So. 2d 598, 602 (La. 1992) for a discussion of this shifting standard and the intention of the framers of the 1974 Constitution to increase the level and scope of compensation in takings cases. See also *Standard Materials, Inc. v. City of Slidell*, 700 So. 2d 975, 984 (La. App. 1st Cir. 1997).

bolder, more comprehensive plans that would both save our coast and provide unprecedented levels of storm protection. The level of effort has been remarkable, even heroic, but it has been focused almost exclusively on the physical and geopolitical landscapes. Unless the legal landscape is more effectively integrated into our coastal planning, it is almost certain that success will be harder and more costly to achieve. Issues of ownership, access, land use regulation, compensation, and even those governing the authorization and funding of projects will be difficult to resolve, but ignoring or deferring them will not make things any easier.

Katrina and Rita have provided one thing that should make this challenging task a bit less difficult, however, and that is a clear and compelling public interest. With the very survival of our communities, culture, and the land beneath our feet at stake, it should be the object of our local, state, and federal governments to apply—or change—our laws to give our citizens, communities, and our coast a fighting chance at a vibrant future. It is a whole new ballgame and our odds of winning depend in large measure on how well we understand, apply, and are served by the laws that make up the legal landscape of our coast.