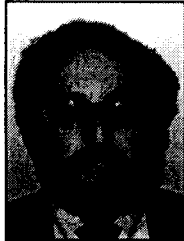


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**The Need for Caution, Creativity, and Cooperation in  
Rebuilding New Orleans After the Flood Waters Recede**  
By M. DAVID GELFAND  
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Monday, Sep. 19, 2005

*This is one in a special series of columns on legal issues arising in the aftermath of Hurricane Katrina. - Ed.*

During the last few weeks, the news has been dominated by the mandatory evacuation of hundreds of thousands of persons from the New Orleans metropolitan area, both before and immediately after Hurricane Katrina struck. Hopefully, during the next few months, a substantial majority of those evacuees will return to their beloved city from the 41-state Diaspora to which they have been scattered.

Though the Hurricane was a natural disaster, the inadequate preparations and inexcusably delayed responses were human failures which raise many old and, maybe, some new legal issues. Here, I will consider some of the issues related to the rebuilding process.

**Why Carefully Planned Restoration, Rather Than Narrowly Focused "Reconstruction," is Needed in New Orleans**

The federal government - finally - is ready to act, and the President wants everyone to see that the federal government is acting with authority. But New Orleans and her neighborhoods should not be "reconstructed" in a rash, unidimensional manner. Instead, restoration must be achieved with caution, cooperation, and creativity.

Caution is necessary, lest policymakers again ignore the planners who have long insisted upon a higher, better-engineered levee system (like those in the Netherlands) and tougher building codes (like those in Florida). Also, the need to preserve historic and distinctive buildings and irreplaceable neighborhoods must become a priority in the restoration of New Orleans. Only then will these crucial interests trump the impetuous ordering of more bulldozers (already threatened by some Congressmen).

Furthermore, planning and implementation of the rebuilding process must be in cooperation with the residents of the neighborhoods involved and their neighborhood associations. Recently, *The Wall Street Journal* chillingly described plans of the "power elite" to rebuild New Orleans "in a completely different way: demographically, geographically, and politically." Unless we insist upon an inclusive, cooperative, localized approach to the planning of restoration of New Orleans, that narrow power elite will have their way. They will do so by conspiring with the companies that currently feed at the



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federal government's trough with massive, no-bid contracts for "redevelopment" abroad, and which may already have received some contracts for the "new" New Orleans.

Unfortunately, the Supreme Court's *New London v. Kelo* decision may have the effect of paving the way for just such public-private conspiracies. In *Kelo*, the Supreme Court recently ruled that the "public use" requirement of the Fifth Amendment is satisfied when a private owner's property, even if not blighted, is "taken" by a government agency in eminent domain proceedings, even if the new construction will be by and for the benefit of private interests.

The only federal constitutional requirements for an exercise of the eminent domain power, after *Kelo*, seem to be that the landowner be paid "just compensation," and that the new project be designed to produce "public" economic benefits.

Thus, *Kelo* seems to allow a redevelopment authority to engage in the mass condemnation (forced sale) of homes and small business properties in and around New Orleans. That authority would probably be able to pay the homeowners pennies on the dollar for their hurricane-ravaged homes and business locations. The buildings would then be razed, and the newly cleared property could be resold or rented to private developers, who would rebuild the bulldozed neighborhood in a more gentrified fashion (e.g., luxury condominiums, upscale shops), thereby arguably producing public economic benefits. However, the current landowners would receive too little money (from the eminent domain proceedings) to allow them to purchase homes or businesses in the redevelopment area, or anywhere in the "new" New Orleans. Indeed, my fear is that the pittance paid to the current owners might not be enough for them to purchase remotely comparable housing or small businesses property even in other cities. Certainly, the fate of tenants is likely to be even worse.

### **Two Possible Responses: Aggressive Litigation, or a Landowners' Compensation Fund**

One option to address this situation, would simply be to bring more heavyweights into the ring: lawyers or legal aid groups that would conduct aggressive litigation over the "just compensation" to be paid in the eminent domain proceedings.

Alternatively, a land compensation fund (financed by government and the private sector) could be created. Its administrators would set -- in advance, by category -- fair (that is, pre-Hurricane) levels of compensation that landowners in the redevelopment area could receive quickly without expensive, time-consuming litigation. (The closest analogy is workers' compensation schemes.) Funds for tenants to relocate within New Orleans should also be part of the overall package.

Of course, some landowners might refuse their pre-set, non-specific compensation. They would have the right (under the Fifth and Fourteenth Amendments) to opt out - but, ideally, a strong incentive not to do so. The key, as Ken Feinberg taught us when he developed the 9/11 Compensation Fund scheme, is to make the pre-set payment high enough and the long-term litigation approach expensive and uncertain enough that owners will opt for the compensation fund payment. (Please note, however, that I am not here proposing a victims' compensation fund as such; rather, it would be an alternative method for paying just compensation to landowners, with some benefits for tenants.)

### **Ensuring New Orleanians Participate In Lucrative Rebuilding Projects**

New Orleans's residents must participate both in the planning and in the implementation of the reconstruction of their own city, because we need to rebuild their spirits and their lives as well as their homes and businesses. Therefore, New Orleanians must be assured of work in the massive, lucrative projects supposedly intended to benefit them.

New Orleans was in the midst of a building boom prior to the Hurricane, so qualified workers in all the building trades are available within the metropolitan area. All that is needed to bring them back is work (on the restoration projects) and temporary housing (e.g., pre-manufactured housing, restructured hulls of the many destroyed boats now scattered near former marinas).

The City or the State would likely run afoul of Article IV's Privileges and Immunities Clause - which forbids discrimination against out-of-state residents with respect to "the common occupations" -- if it mandated that a certain percentage of workers employed on restoration projects be citizens of New Orleans or Louisiana. But that Clause does not protect corporations, and it, of course, does not apply to the federal government.

Therefore, legislation could include a requirement that a specified portion of rebuilding dollars had to be contracted with Louisiana corporations or partnerships (created prior to August 29, 2005), and federal legislation could require that a specified portion of the workforce on all rebuilding projects must be from the New Orleans metropolitan area.

Also, legislation authorizing rebuilding funds from all three layers of government should contain an affirmative action component for disadvantage business enterprises. A clear majority of the Supreme Court gave its approval to carefully crafted affirmative action programs in the context of University admissions in 2003. Subsequently, federal circuit courts have applied that analysis to uphold federal Department of Transportation regulations regarding participation by disadvantaged business enterprises. The Department of Homeland Security also has a regulation requiring affirmative action in contracts under its direction.

In addition, the "new" New Orleans should take account of the racial impacts of demolition and reconstruction. A model for this could come from the racial justice movement in the environmental field. Though the movement has typically focused on challenges to the location of undesirable industrial plants in poor and minority neighborhoods, it provides mechanisms for assessing the racial impact of changes - even those deemed "gentrification" by the developers -- on a particular neighborhood.

Given the scale of the rebuilding/restoration effort, the implications of transportation design must be considered. Though anyone who has ever driven in New Orleans would probably like more boulevards and wider streets, rebuilding planners should resist the Robert Moses master-builder syndrome (which plans urban construction based upon the views that will be available from the family automobile). By now, the whole world knows that a huge portion of New Orleans's population does not have access to private transportation. Therefore, we must not repeat the Twentieth Century mistake of tearing up the street car tracks in favor of the automobile. Before the Hurricane, New Orleans had a robust program to rebuild some of those historic street car lines (largely funded by the federal government). The post-Hurricane city and suburbs present an ideal environment for a beautiful, fuel-efficient public transportation system.

In short, New Orleans needs a cautious, creative rebuilding/restoration process based upon protection, preservation, and participation in planning.

### **Responses Must Evolve in Light of an Exceptionally Fluid Situation**

My caution, in suggesting some responses to the rebuilding/restoration process springs from the fast-moving nature of the relevant developments and the general recognition that the situation is somewhat unique, given the massive scale of the human relocation and building reconstruction involved. As a result, established legal principles might not be applied in a totally predictable manner to this somewhat unusual situation.

At times, the law just suspends the usual practice (tax filing deadlines are extended, statutes of limitations are tolled, elections are postponed). Sometimes, the law brings to bear little-used-but-known principles (for example, the necessity defense in criminal cases, as detailed by Professor Langston in an earlier column). And sometimes, new principles must be crafted to respond to the crisis, or traditional principles must be applied in a novel fashion.

Hence, the glib responses and superficial answers of pundits and commentators will soon be scattered like the debris on what is left of my yard. Instead, the many challenges we face in the rebuilding process require careful and creative responses that spring from a cooperative, inclusive decisionmaking process.

For reasons I dare not explain, I remain cautiously optimistic that New Orleans will regain some of her faded-elegance character, and that we will again be reminded that the uniqueness of our city is derived from the spirit and vitality its people (of all races, ethnicities, and classes), not just from the configuration of its buildings.

But even if that vision proves to be a chimera, I know that on February 28, 2006 (Mardi Gras Day), or sooner, real gumbo will tantalize my tongue, Nicholas Payton's trumpet will thrill my ears, I will catch throws from a parade on the Avenue, I will sing (as loudly and poorly as ever), and I will second-line while waving my handkerchief in the air -- all in my beloved New Orleans. But that handkerchief also must dry the river of tears I have shed for flooded neighborhoods and my lost neighbors.

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