



ON THE BALLOT

A Report from the Bureau of
Governmental Research

Issues on the Ballot for September 30, 2006

INTRODUCTION

ON SEPTEMBER 30, Louisiana voters will be asked to approve 13 constitutional amendments. This report focuses on those that are relevant to Greater New Orleans in four arenas: coastal restoration and flood/hurricane protection, expropriation, the homestead exemption, and unfunded state mandates.

The first four amendments deal with issues related to coastal restoration and flood protection. Amendments 1 and 2 would expand financing and refocus governance on an integrated approach to coastal restoration and hurricane protection. Amendment No. 3 would empower the Louisiana State Legislature to establish regional levee boards. Amendment No. 4 would limit compensation for property affected by hurricane protection projects.

Amendments 5 and 6 would limit the power of expropriation. Amendment No. 5 would prohibit the State or its political subdivisions from taking property for “predominant use” by, or transfer to, any private person or entity, except for certain industrial and port projects; define the public purposes for which property can be taken; prohibit takings for economic development or tax enhancement purposes; and expand the compensation payable in most takings. Amendment No. 6 would prohibit the State or its political subdivisions from transferring property to another private party within 30 years of an expropriation without first offering it to the original owner.

Two amendments deal with property tax exemptions and assessments. Constitutional Amendment No. 8 would allow owners of disaster-damaged homes to retain for up to five years the homestead exemption and the assessment freeze to which some homeowners over 65 are entitled. Amendment No. 11 would make all types of trusts eligible for the homestead exemption.

Constitutional Amendment No. 9 would limit, with certain exceptions, the ability of the State Legislature to impose mandates on school systems without providing the money needed to fund them.

Constitutional Amendment No. 1: Coastal Protection and Restoration Fund

What it would do

This proposed amendment would add hurricane protection to the coastal restoration purposes of the state Wetlands Conservation and Restoration Fund and the entity overseeing the fund, the Wetlands Conservation and Restoration Authority. To reflect the expanded purposes, the wetlands fund would be renamed the Coastal Protection and Restoration Fund, and the wetlands authority would be renamed the Coastal Protection and Restoration Authority.

The proposed amendment would also:

- Allow the fund to retain the current portion of state mineral revenue it receives annually.
- Direct to the fund an anticipated share of federal revenues generated from oil and gas activity on the Outer Continental Shelf of the Gulf of Mexico.
- Dedicate the federal revenues to coastal protection, including conservation, coastal restoration, hurricane protection, and infrastructure affected by coastal wetlands losses.
- Require the Coastal Protection and Restoration Authority to expend funds for purposes consistent with a coastal protection plan.

Passage of the amendment would activate companion legislation to implement the Coastal Protection and Restoration fund and authority. Among other things, the legislation directs the authority to develop a comprehensive coastal protection plan in coordination with federal agencies and political subdivisions of the State, including levee districts. The governor’s executive assistant for coastal activities would oversee the planning process. The State Department of Natural Resources would have primary responsibility for carrying out elements of the plan pertaining to coastal wetlands conservation and restoration. The State Department of Transportation and Development would carry out elements pertaining to hurricane protection. The legislation expands the purview of the Governor’s Advisory Commission on Coastal Restoration and Conservation to include hurricane protection projects.

Analysis and Impact

State lawmakers have proposed the amendment in anticipation of new federal funding for Louisiana's hurricane protection and coastal restoration projects. This funding would come from a share of federal revenues derived from oil and gas production in the federal portion of the Outer Continental Shelf, the water bottoms offshore the United States. The federal Energy Policy Act of 2005 will provide Louisiana with an estimated \$135 million a year in such revenues for four years, beginning in 2007, primarily for coastal restoration projects. In addition, Congress is considering a long-term revenue sharing arrangement with Louisiana and other coastal states. Under the Senate version approved August 1, 2006, Louisiana could receive an additional \$200 million over the next 10 years and more than \$650 million annually beginning in 2017. The bill must now be reconciled with a House version.

By contrast, the Wetlands Conservation and Restoration Fund has received a total of \$449 million, primarily state mineral revenue, since 1990. On average, that is approximately \$26 million per year.

Under the proposed amendment, the fund could finance both wetlands restoration and hurricane protection projects, as opposed to the current wetlands-only dedication.

Proponents cite two main reasons for voting for the proposed amendment. First, it would help Louisiana get a share of offshore revenues by assuring Congress that Louisiana will use such revenue for the intended purpose. Second, the amendment and the companion legislation will help the State to integrate hurricane protection and coastal restoration plans for better coastal protection. The integrated approach recognizes that both man-made structures and natural wetlands are necessary to break down hurricane tidal surges. The Coastal Protection and Restoration Authority would be responsible for coordinating and synthesizing multiple plans for storm protection and wetlands restoration. Proponents contend this approach presents the best chance to make complex, but sound, scientific judgments and steer federal and state funding to its most effective uses.

The proposed amendment has raised some concern that appropriations from the fund could shortchange wetlands restoration projects in favor of politically popular construction of hurricane protection projects. The authority must carefully balance those competing interests in its coastal protection plan and annual outlays.

Under the companion legislation that would be activated by the passage of the amendment, the majority of board members would be department heads or advisors appointed by the Governor. Some have expressed concern that this

would place a significant amount of resources in the hands of political appointees of the Governor. Others argue that the board brings together the multiple state departments critical to the success of an integrated approach to coastal protection. If necessary, the State Legislature could alter the board composition.

BGR Position: FOR. The coordinated approach of the Coastal Protection and Restoration Authority presents an opportunity to integrate plans for hurricane protection and coastal restoration. This approach could make more effective use of state and federal investment than would pursuing each objective separately.

Constitutional Amendment No. 2: Tobacco Settlement Proceeds for Coastal Restoration

What it would do

In 2003, voters passed a constitutional amendment creating the Louisiana Coastal Restoration Fund and authorizing it to receive 20% of the proceeds from any future bonds sold against the State's tobacco settlement revenues. The proposed amendment would eliminate that fund and substitute the Coastal Protection and Restoration Fund as the recipient of future tobacco settlement bond proceeds.

The amendment would further allow the Legislature to appropriate up to 20% of the Coastal Protection and Restoration Fund's share of the bond proceeds for the purpose of barrier island stabilization and preservation.

Analysis and Impact

The amendment would provide the Coastal Protection and Restoration Fund (or, if amendment No. 1 fails, the Wetlands Conservation and Restoration Fund) with an additional source of revenue.

In 1998, tobacco companies and 46 states, including Louisiana, entered into a Master Settlement Agreement to resolve litigation. The settlement entitles the State to annual payments by the companies, which will continue for as long as tobacco products are sold in Louisiana. In 2001, the State sold bonds secured by 60% of the future payments due under the settlement, netting approximately \$1.07 billion. The State has not issued any new bonds since then and continues to receive the remaining 40% of the payment stream.

The proposed amendment coincides with ongoing discussions among state officials regarding new bond issues. The State can either refinance the 2001 bonds or issue new bonds backed by all or part of the remaining 40% of the settlement proceeds that it still receives. The amount of

money created by either option depends on several factors, such as interest rates, types of debt structures, and maturity dates. Based on recent proposals received from investment firms, refinancing could yield in excess of \$500 million, while new bonds could yield between \$900 million and \$1.1 billion. If the amendment succeeds, the 20% share for the Coastal Protection and Restoration Fund could range from \$100 million to \$220 million.

Proponents argue that future tobacco bond proceeds would provide a significant source of state dollars for both coastal restoration and hurricane protection projects. Such dollars will likely be needed to satisfy matching requirements for anticipated federal funds. In addition, the amendment would eliminate a duplicative fund for coastal restoration projects and concentrate the proceeds in the Coastal Protection and Restoration Fund.

BGR Position: FOR. The proposed amendment, along with Amendment No. 1, would solidify the Coastal Protection and Restoration Fund as the primary state fund dedicated to coastal protection projects. It would also pave the way for the State to make significant contributions to the fund to match new federal allocations.

Constitutional Amendment No. 3: Levee Board Consolidation

What it would do

This proposed amendment would allow the State Legislature to establish regional flood protection authorities. The amendment would limit the authorities' territorial jurisdiction to parishes and levee districts situated wholly in or partially in Louisiana's coastal zone. In the New Orleans area, the zone includes all parishes south of Lake Pontchartrain and the parts of Tangipahoa and St. Tammany parishes south of Interstate 12 and Interstate 10.

The amendment would allow the Legislature to decide which parishes, or portions of parishes, and their respective levee districts should be included in each regional authority. Each regional authority would be governed by a board of commissioners. Each board would also govern the individual levee districts within the territorial jurisdiction of the authority.

The proposed amendment authorizes the regional authorities to levy taxes on property within their territorial jurisdictions. Such taxes must win the approval of a majority of

Table 1: Regional Authorities

Southeast Louisiana Flood Protection Authority – East

Parish Territory Included	Levee Districts Included
Jefferson (East Bank only)	East Jefferson Levee District
Orleans Parish (East Bank only)	Orleans Levee District (East Bank territory)
St. Bernard	Lake Borgne Basin Levee District
St. Tammany, south of I-12 / I-10	St. Tammany Levee District*
Tangipahoa, south of I-12	Tangipahoa Levee District*

For regional projects, the authority also includes St. Charles and St. John the Baptist parishes (East Banks only)

Southeast Louisiana Flood Protection Authority – West Bank

Parish Territory Included	Levee Districts Included
Jefferson (West Bank only)	West Jefferson Levee District
Orleans (West Bank only)	Orleans Levee District (West Bank territory)

* New districts

voters within an authority's jurisdiction and within every parish territory in that authority. The taxes would be subject to the homestead exemption.

In addition, the amendment authorizes the Legislature to appropriate up to \$500,000 a year for regional authorities from the Coastal Protection and Restoration Fund.

The Companion Legislation: Levee Board Consolidation in the New Orleans Area

Passage of the amendment would activate legislation to create two regional flood protection authorities in the New Orleans area. One, called the "Southeast Louisiana Flood Protection Authority – East," would include: the portions of Jefferson and Orleans parishes lying east of the Mississippi River; St. Bernard Parish; the coastal zone portions of Tangipahoa and St. Tammany parishes; and, for regional projects only, the portions of St. John the Baptist and St. Charles parishes lying east of the Mississippi River (the East Authority). The other regional authority, called the "Southeast Louisiana Flood Protection Authority – West Bank," would include the portions of Jefferson and Orleans parishes lying west of the Mississippi River (the West Bank Authority). It would not include the west bank portions of St. John the Baptist and St. Charles parishes. Neither authority would include Plaquemines Parish. The consolidation would occur on January 1, 2007, at the earliest.

The legislation would create new levee districts for the coastal zone portions of Tangipahoa and St. Tammany. Table 1 summarizes the affected parishes and levee districts

in the New Orleans area.

The regional authorities would have governing boards with a majority of professional members. The governor would appoint all members from nominations made by a 13-member committee with significant engineering, hydrological, or other professional expertise. Table 2 summarizes the board membership of each authority.

The board structure is intended to override parochial interests. It would limit the total number of members from parishes within the East Authority to six and within the West Bank Authority to four. Approval of projects would require a two-thirds vote of an authority, regardless of whether the project is limited to one or more levee districts within the territorial jurisdiction of the authority. Non-project matters would require a simple majority vote.

Members of the East Authority appointed as residents of St. Charles or St. John parishes would be non-voting members, except for any project that includes all or part of their parishes.

Members of the West Bank Authority appointed as residents of Orleans Parish would be non-voting members, except for any project that includes all or a portion of Algiers. This provision would limit the parish voting membership in most cases to the Jefferson Parish representatives.

The board of a regional flood protection authority would have the power to carry out a variety of projects, such as canals, drainage systems, erosion control measures, marsh management, coastal restoration, and other flood control works, to protect against tidewater flooding, hurricanes, and saltwater intrusion. The board’s objective would be comprehensive flood protection of its territory. Each board could enter into contracts on its behalf or on behalf of any levee districts within its territorial jurisdiction.

The law prohibits regional authorities and levee districts from owning, operating, or controlling any facilities and improvements not directly related to tidewater flooding, hurricane protection, and saltwater intrusion, *e.g.*, airports. Once the legislation takes effect, the entities would have to turn over management and control of such existing properties to the State Division of Administration. The division could then sell, lease, or otherwise transfer the properties. The division would have to remit excess revenues from properties under its management and control to the regional authority to the credit of the levee district in which a property is located.

The legislation maintains the levee districts as separate entities. Tax revenues of each district would be managed by the regional authority in separate accounts and could be used and expended only for the purposes of the respective districts. Each levee district would continue to own properties acquired or built with its own funds and receive all income derived from them. The regional authority would manage those properties. Such properties exclude those placed under the control of the Division of Administration.

The regional authorities could employ a regional director to serve at the pleasure of the board. The authorities could hire other employees, all of whom would be considered civil service employees. The status of levee district police is unclear. The companion legislation states that the authorities would not directly employ police forces, but could enter into security agreements with local police. Legislation passed in the 2006 Regular Session continues the employment of current law enforcement personnel.

Analysis and Impact

Hurricane Katrina’s tidal surge, which did not heed jurisdictional boundaries, prompted the State Legislature to devise a regional approach to flood protection. For decades, flood protection projects have been managed on the basis of individual parishes. The regional approach provides a more coordinated level of protection among local jurisdictions.

The proposed amendment and legislation are the result of political compromise, and fall short of creating one regional entity to deal with hurricane protection meas-

Table 2: Regional Authority Governance

Board Membership	East Authority	West Bank Authority
Total Members (a)	11	7
Engineers or professionals in related fields such as geotechnical, hydrological, or environmental sciences (b)	5	3
Professionals in other disciplines with at least 10 years of experience (c)	3	2
At Large (c)	3	2

(a)For the East Authority, only one member from each parish. For the West Bank Authority, only two members from each parish.
 (b)One must be a civil engineer and one a geologist or hydrologist.
 (c)For the East Authority, one must reside in the east bank of St. Charles or St. John. For the West Bank Authority, one must reside in Algiers.

ures in the New Orleans region. The West Bank Authority resulted after vigorous opposition to a single regional board from West Bank legislators, local leaders, and residents. They argued that the West Jefferson Levee District had already received funding to complete the West Bank and Vicinity Hurricane Protection Project, a levee system protecting many West Bank communities from the St. Charles-Jefferson parish line to the Mississippi River lock in Algiers to Belle Chasse in Plaquemines. Further, they argued that those communities risk flooding from tidal surges from the Gulf of Mexico, while east bank communities risk flooding from Lake Pontchartrain and Lake Borgne. They feared a loss of attention and local tax dollars in the context of a broad, regional board.

The amendment and companion legislation would make the board professional by requiring the participation of engineers and other professionals. The nominating committee for the board members would also have significant expertise. This should help to focus the entity on its core mission and reduce political shenanigans over contracting.

Consolidating levee boards would also help convince Washington that funds appropriated for hurricane protection in the New Orleans area will be well spent. An unduly fragmented system has undermined confidence.

BGR Position: FOR. Although the companion legislation proposes a bifurcated structure in the New Orleans area, greater regional governance of the fragmented levee district system would help ensure a more coordinated, comprehensive defense against hurricanes. Professional dominance on the boards of the regional authorities would increase their effectiveness.

Constitutional Amendment No. 4: Compensation for Property Affected by Hurricane Protection

What it would do

This proposed amendment would limit compensation for takings of, or loss or damage to, property affected by hurricane protection projects, including related mitigation. Such compensation would be set at the standard required by the Fifth Amendment of the U.S. Constitution. The modified compensation standard would not apply to compensation paid for buildings or structures destroyed or damaged in a major disaster, if the taking occurs within three years of the disaster.

The amendment authorizes the Legislature to provide procedures and definitions for the new limit. The Legislature has approved companion legislation, which would take effect only upon passage of the amendment, to implement

the compensation limit and the disaster exception.

Analysis and Impact

State officials have voiced concerns about the State's potential costs of compensating property owners affected by hurricane protection projects. With such projects escalating in size and scope following the 2005 hurricanes, the concerns have taken on a greater urgency.

Article 1, Section 4 of the Louisiana Constitution requires the State or its political subdivisions to pay "just compensation" to owners of expropriated property. It guarantees the right to a trial by jury to determine compensation and provides that the owner shall be compensated "to the full extent of his loss."

Louisiana courts have interpreted the "full extent of his loss" standard to mean the fair market value of the property plus other provable damages, such as lost rental revenues and business profits. In contrast, damage awards under the Fifth Amendment of the U.S. Constitution are limited to the fair market value of the property.

The federal limit already applies to takings of, or loss or damage to, property rights affected by coastal wetlands conservation, management, preservation, enhancement, creation, or restoration activities. Establishing the same standard for hurricane protection projects (including levees to the extent they serve that purpose) fits well with the State's plan to develop an integrated approach to hurricane protection and coastal restoration.

Proponents of the amendment say limiting compensation for hurricane protection projects to fair market value is long overdue. The limit would bring Louisiana further in line with compensation practices of other states and the federal government. It would also hold down the cost of hurricane protection projects.

As noted above, the current Louisiana standard is more generous than the federal one. Proposed Amendment No. 5 would make that standard even more generous. Should Amendment No. 5 pass, and Amendment No. 4 fail, the cost of expropriating property for hurricane protection projects would increase above the current level.

Opponents have argued that compensation limits, such as the 2003 amendment for coastal restoration projects and the proposed amendment, raise an issue of equal protection under the law, placing property owners affected by those projects in a different class than citizens affected by other public works projects. Those affected by coastal restoration and hurricane protection projects would be deprived of categories of damages, such as the loss of future earnings, that other citizens are entitled to receive.

BGR Position: FOR. Financing hurricane protection projects is critical to the future of southern Louisiana and the State as a whole. The federal standard of compensation is reasonable for this vital area of public safety and welfare.

Constitutional Amendment No. 5: Limiting the Power of Expropriation

What it would do

The proposition would amend Article 1, Section 4 of the Louisiana Constitution, which defines the right to property and sets the parameters for expropriation. Currently, it broadly confines the expropriation power of the State and its political subdivisions to takings of private property for public purposes, and it requires compensation. Subject to limited exceptions, the expropriating entity must compensate the owner “to the full extent” of his loss.

Amendment No. 5 would:

- Prohibit takings, except takings for industrial plants and port projects, by the State and its political subdivisions for “predominant use” by a private party or for transfer of ownership to a private party.

- Define the term “public purposes” for takings by the State or its political subdivisions, limiting it to the following:

- A general public right to a definite use of the property

- “Continuous public ownership” dedicated to the following uses:

- o Public buildings in which publicly funded services are administered or provided

- o Roads, bridges, waterways, access to public waters or lands, and other public transportation, access, and navigational systems available to the general public

- o Drainage, flood control, levees, coastal and navigational protection and “reclamation for the public generally”

- o Parks, convention centers, museums, historical buildings, and recreational facilities open to the public

- o Public utilities for the benefit of the general public

- o Public ports and airports

- Removal of a “threat to public health or safety caused by the existing use or disuse of the property”

- Prohibit consideration of economic development, enhancement of tax revenue, or any incidental benefit to the public in determining whether the taking or damaging of property constitutes a public purpose.

- Expand compensable damages by stating that, except as otherwise provided in the Constitution, the “full extent of his loss” includes, but is not 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.”

- Amend Article VI, Section 21 to prohibit the taking of homesteads (a primary residence on up to 160 acres of land) for industrial development or port businesses.

Analysis and Impact

The Fifth Amendment to the U.S. Constitution imposes limits on the federal government’s power to take private property. It provides that no person shall be deprived of property “without due process of law; nor shall private property be taken for public use, without just compensation.” The amendment is made applicable to the states through the Fourteenth Amendment to the U.S. Constitution. State constitutions sometimes impose additional limits on states’ ability to take property. The phrase “public use” has been at the center of a national controversy – a controversy that has led to the amendment that is about to go before Louisiana voters.

In 2000, the City of New London, Conn., approved a development plan to revitalize the downtown and waterfront area of the economically distressed city. It authorized its economic development agency to acquire property in the redevelopment district and transfer it to a number of private entities in accordance with the plan. The development corporation exercised the power of eminent domain after a number of property owners refused to sell, and the owners challenged the takings, alleging that they were not for public use. The U.S. Supreme Court held in the case, *Kelo vs. City of New London*, that the takings satisfied the public use requirement. In so doing, it refused to adopt a bright line rule that economic development does not qualify as a public use. It also refused to find that the transfer of property to a private party tainted an otherwise valid public purpose.

(For more detail on this topic, see the expanded discussion on BGR’s web site, www.bgr.org.)

Proponents of Louisiana’s proposed constitutional amendment argue that the *Kelo* decision changed the ground rules, making Louisiana property owners vulnerable to expropriation for private purposes. Therefore, they argue, a constitutional amendment is needed.

As the Supreme Court noted in *Kelo*, the necessity and wisdom of using eminent domain to promote economic development is a legitimate subject of debate. Supporters of the concept argue that it is an essential tool for redevelopment, particularly in older, impoverished cities burdened by fixed municipal boundaries and highly subdivided land – i.e., impediments to modern, large-scale development. Without it, cities will languish, unable to improve the situation of the community as a whole.

Opponents argue that allowing the exercise of eminent domain for economic development purposes would give local governments carte blanche to take property. They also argue that the beneficiaries of the *Kelo* decision are likely to be the wealthy and well connected, such as large corporations and developers, and those hurt are likely to be small property owners.

The Louisiana Legislature could have dealt with situations similar to *Kelo* by prohibiting the transfer to private persons of property expropriated for economic development purposes. One of the many bills submitted in the last session would have done just that. However, the proposed amendment goes far beyond prohibiting takings for economic development purposes. It rolls back the clock to hinder effective, large-scale blight remediation plans. It increases the costs of taking for necessary and traditional government purposes and may inadvertently preclude takings for purposes that would fall into that category. It creates ambiguities and anomalies.

Defining Public Purposes

For two centuries, the courts have struggled to define the phrase “public use” — the phrase used in the U.S. Constitution to limit the taking power. The Legislature proposes to boil down the equivalent phrase from the Louisiana Constitution, “public purpose,” to a list of acceptable purposes.

Defining a general and fluid legal concept such as public purpose is fraught with peril. It is difficult to anticipate the future situations that a society will encounter and the role that government might be expected to play. In addition, when the list is very specific in its detail, there is a risk of inadvertent, or at least inexplicable, omissions. For example, under the proposed amendment, a publicly owned performance hall would not be a public purpose. Meanwhile, museums and convention centers would be. It is unclear whether a stadium or other arena for professional sports would be a public purpose. Finally, while specific uses such as parks and historical buildings would be considered public purposes for expropriation, broad purposes such as redevelopment, job creation, and the provision of housing would not be.

Limiting Blight Remediation

The definition of public purpose also includes as a public purpose the “removal of a threat to public health or safety caused by the existing use or disuse of the property.” A threat to the general welfare, a common justification for blight remediation, is not sufficient to justify a taking of blighted property. This, in effect, creates a higher burden for declaring blight: the property must pose an actual threat to public health or safety, not just be empty and dilapidated or otherwise pose a threat to general welfare. Supporters state that the change was made because the concept of general welfare was too broad and susceptible to abuse.

The amendment would prohibit the expropriation of a non-blighted property located in an area that is badly blighted. This could create serious problems even in normal circumstances, by preventing effective remediation when the area as a whole poses a threat to the public health or safety. The ramifications are more serious in the extraordinary circumstances facing many communities in southeast Louisiana.

Prior to Katrina, New Orleans contained more than 20,000 blighted properties, an alarming number in itself. The storm and levee breaks led to the damage of 134,000 housing units, with 107,000 of those flood-damaged. Coupled with the departure of many residents, these numbers will lead ineluctably to a blight problem likely never before seen in an American city. Similar problems can be expected in St. Bernard Parish and other areas. In light of this, expropriation would be a critical tool for redevelopment.

Private Use

The proposed amendment states that in part that: “Except as specifically authorized by Article VI, Section 21 of this Constitution property shall not be taken or damaged by the state or its political subdivisions: (a) for predominant use by any private person or entity; or (b) for transfer of ownership to any private person or entity.” Article VI, Section 21 allows expropriation by political subdivisions and ports for industrial plants and deep water port facilities.

The provision takes square aim at the Supreme Court’s position in *Kelo* that property taken for a public purpose need not remain in public ownership. It does so in a way that creates interpretive and substantive problems.

First, the “predominant use” phrase is vague, and its relationship to the public purpose test is unclear. What does predominant use mean? Is it measured, by time or space? What’s the relevant percentage? Could property be expropriated by a school board and leased to a charter school under contract with it? Could it be expropriated for a government owned stadium if the facility would be used predominantly by one team?

Second, the prohibition on transferring property could force the government to go into businesses beyond its core competencies. Take, for example, the case of blighted property that poses a threat to health and safety. The government could expropriate such property. It could not, however, transfer it to a private entity, even in an arm's length sale to a nonprofit entity, an urban homesteader, or any other private person. The government would have to become a landlord or transfer the property to another government entity. The property would remain out of commerce and, by virtue of its ownership by the government entity, off the tax rolls.

Third, the exception for industrial plants and port facilities seems somewhat arbitrary and focused on the old economy. What makes an industrial plant worthy of an exception, whereas, say, a biomedical research facility would not be? What makes a commercial maritime operation a worthy exception, whereas, say, a film studio would not be?

The Economic Development Prohibition

The amendment specifically states that economic development or enhancement of tax revenue "or any other incidental benefit to the public shall not be considered in determining whether the taking or damaging of property is for a public purpose" pursuant to the foregoing provisions. This could effectively remove the expropriation power of economic development and redevelopment corporations, since their *raison d'être* is economic development. It could nullify existing law that justifies expropriation for slum clearance and redevelopment in terms of economic development.

It is unclear what effect it would have even for the declared public purposes. Does it impose an additional burden? If not, why include the language, since all potential public purposes have already been whittled down to a list? By removing economic development, tax revenue enhancement, and "incidental benefits" (a phrase whose meaning is unclear) as possible considerations in whether a taking constitutes a public purpose, the amendment may create a great array of other unforeseen consequences.

Muddying the Powers of Common Carriers

The proposed amendment creates new ambiguities and issues in areas that were previously settled. One such area of uncertainty is the ability of common carriers to expropriate property needed for the delivery of their services.

Article I, Section 4 provides in part: "Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner." Pursuant to that provision, the Legislature has authorized common carriers, such as railroads and utilities, to expropriate property.

The proposed amendment does not change the language addressing expropriations by authorized private entities, and it does not redefine "public purpose" as used in that provision. The parties involved in the drafting process claim that there was no intent to limit the expropriation power of common carriers.

However, the portions of the amendment circumscribing the State's expropriation power may inadvertently limit private expropriations. Under the proposed version, the State itself would no longer have the power to expropriate for many purposes currently allowed, including for a pipeline or a privately owned utility. If the State itself would no longer have the power to expropriate property for such purposes, it is difficult to see how it could delegate the power to a private entity. This is particularly true in light of the prohibition on transferring property to private parties.

There are arguments on both sides of the issue. Unfortunately, the poorly drafted amendment is an invitation for litigation.

Ratcheting Up Just Compensation

The proposed amendment would expand the compensation standard applicable in takings, unless the Constitution provides otherwise. The new standard would pick up inconvenience, and any other damages incurred because of the expropriation.

Louisiana courts have interpreted Louisiana's current compensation standard, which requires compensation "to the full extent of his loss," as entitling the owner of the expropriated property to the fair market value of the property plus other provable damages, such as lost rental revenues or business profits. The standard already outstrips the federal one, which limits compensation to the fair market value of the property taken. The proposed amendment would increase the cost of property acquisition by government and heighten the disincentive for an owner to willingly sell for a fair price.

Circumscribing the Industrial Exemption

Article VI, Section 21 of the Constitution currently allows any political subdivision to expropriate for industrial development or port businesses. As discussed above, the proposed constitutional amendment would continue to allow governments to transfer expropriated property to private entities for that purpose. It would also, however, prohibit the taking of homesteads (a primary residence on up to 160 acres of land) for industrial development or port businesses. The State could still take them for other public purposes, such as convention centers and recreational facilities.

BGR Position: AGAINST. The proposed constitutional

amendment is clumsily drafted and is likely to create an array of difficulties in an arena in which Louisiana has no history of problems. While other states might have the luxury of experimenting with their eminent domain guidelines, Louisiana does not. This State faces daunting post-Katrina redevelopment challenges, and it would ill-serve citizens to tamper with some of Louisiana's basic redevelopment powers. It would particularly ill-serve Louisiana to emboss those tamperings on the pages of the State Constitution, where any new malfunctions would be hard to fix, and where any new wrongs would be hard to right.

Constitutional Amendment No. 6: Offering Expropriated Property Back to Original Owner

What it would do

Amendment No. 6 would prohibit the state or its political subdivisions from selling or leasing property it has expropriated to another private party for 30 years, without first offering it to the original owner. After 30 years, the property could be sold or leased as provided by law.

It would require the State or political subdivision to identify any surplus property – property not needed for the project that required the expropriation – within one year of the completion of the project. These properties would be offered back to the original owner (or his heir) at fair market value within two years of completion of the project. The original owner would have three years from the date of completion to purchase the property, after which time it would be offered for sale to the general public by competitive bid.

Also within one year of the expropriation, the previous owner or heir may petition the State or political subdivision to have the property or a portion of it declared surplus. The previous owner may appeal denial of the petition to a court.

An exception is made for leases or operation agreements for port facilities, highways, transportation facilities, and airports.

Analysis and Impact

Amendment No. 6, like No. 5, is designed to protect property owners from capricious expropriation actions involving the transfer of property from one private person to another. It would also give property owners a right of first refusal should the government ultimately not need property it expropriated for its own use. While this may be desirable or fair where the government has taken property for specific projects, it could hamper legitimate takings for blight remediation by requiring that the property be offered back

to the owner of the blighted property before it is offered to another private party. This could force the governing body to return the property to the party that created the problem or sit on it for 30 years.

BGR Position: AGAINST. The amendment would unnecessarily complicate blight remediation.

Constitutional Amendment No. 8: Allowing Owners of Damaged Homes to Retain Homestead Exemption, Special Assessment

What it would do

The proposed amendment would allow owners of homes damaged in a disaster to retain the homestead exemption if they are unable to reoccupy the destroyed or uninhabitable home due to a disaster or emergency. The governor must have issued a proclamation declaring the disaster or emergency.

To retain a homestead exemption, an owner must file an annual affidavit stating his intention to reoccupy the home by December 31 of the fifth year after the initial affidavit. The first affidavit must be filed with the assessor anytime during the calendar year after the disaster. The exemption may be renewed annually for up to five years by filing an affidavit each year. There is no requirement that the owner actually reoccupy the home after filing the affidavits.

The proposed constitutional amendment would allow a homeowner entitled to the special assessment level to retain the pre-disaster assessment on the repaired or rebuilt homestead. The special assessment level is the artificial freeze in assessed value for owners over age 65 with an income of under approximately \$58,000. The owner must reoccupy the home by December 31 of the fifth year after the initial affidavit to retain the special assessment.

The limit of only one homestead exemption per owner in Louisiana would still apply. If a homeowner filed for the homestead exemption on another property, he would lose the exemption on the damaged home. If the property owner also benefited from the special assessment, the property would be reassessed at fair market value.

Analysis and Impact

Under current law an owner who occupies his home is eligible for the homestead exemption. Without the proposed amendment, an owner unable to reoccupy his former home because of hurricane damage would not be eligible for the homestead exemption. He would have to pay tax on the full, though damaged-reduced, assessment.

Current law also provides for a freeze of assessed value of homesteads whose owners are over 65 and have an annual income below a certain threshold, about \$58,000 this year. Without the amendment, the assessments applicable to displaced homeowners who would otherwise meet the qualify criteria would move to current assessed value.

The proposed amendment is intended to help the owner who, through no fault of his own, cannot occupy his home. While the goal is worthy, there are some downsides to the amendment. One is the lengthy period of time for which the hurricane-related exception remains in effect. Some argue that five years is too long a period, and that homeowners with a bona fide intention of returning to their homes would do so sooner.

Protecting property owners from taxes for too long a period of time may remove an incentive for returning the property to commerce. The lower the cost of clinging to damaged property, the more incentive the owner has to postpone a final decision on whether to rebuild or sell. Property that might have gone on the market, been repaired, been occupied, and generated some local tax revenue would remain unproductive and a drain on the local tax base.

If the amendment passes, the parish governmental bodies that rely on property tax would continue to experience reduced property tax revenue. Each homestead exemption costs tax recipient bodies in Orleans Parish up to \$1,300. BGR has repeatedly said that an automatic homestead exemption, without regard to income, is bad policy.

Property owners have already received the benefit of the proposed amendment, albeit conditionally. On March 15, the Louisiana Tax Commission issued an order directing assessors to retain the homestead exemption on, but to keep track of, properties that would lose the exemption if the proposed amendment fails. Tax bills were computed as if the proposed amendment had already passed.

Under the proposed amendment, the property owner need only *intend* to reoccupy the home within five years to receive the homestead exemption. This is a highly subjective standard susceptible to abuse. To address the issue, the Louisiana Tax Commission, the statewide body which oversees assessment practices, or the Legislature could require procedures to verify an owner's good faith attempt to rebuild his home. The proposed amendment imposes a different standard for retaining the assessment freeze, making it contingent on an event that cannot be determined until after the fact.

BGR Position: AGAINST. While assisting homeowners working to rebuild their homes is a worthy goal, the proposed amendment is not the solution. The exemption and assessment freeze would apply for too long a period of time.

In addition, it would be virtually impossible to determine whether a homeowner satisfied eligibility requirements.

Constitutional Amendment No. 9: Limiting State Mandates for School Systems

What it would do

The proposed amendment would, under certain conditions, protect public school systems from unfunded mandates. The proposed amendment provides that no law requiring an increased expenditure by a public school system would become effective unless:

- The Legislature appropriates funds necessary to accomplish the purpose of the law.
- The Legislature provides for a local source of revenue adequate to accomplish the purpose of the law and the local governing authority authorizes its collection.

If only partial funding were provided, the school system would be required to provide the mandated service only to the extent possible with the partial funding provided.

The proposed amendment would not apply to a law passed by a two-thirds vote of each house of the Legislature. The prohibition also would not apply to the following:

- A law requested by the school board of the affected system
- A law defining a new crime or amending an existing crime
- A law effective prior to adoption of the amendment
- A law enacted to comply with a federal mandate
- A law having an insignificant fiscal impact on the affected school system
- The formula for the Minimum Foundation Program (MFP) or any legislative instrument approving the MFP formula
- Any law that relates to the implementation of the state school and district accountability system

Analysis and Impact

In 1991, voters adopted a constitutional amendment limiting unfunded mandates affecting local governments, other than school boards. The proposed amendment provides some, although not equivalent protection, for school boards.

The impetus for the proposed amendment was a legislative mandate requiring school systems to pick up an increased share of employee health care costs. In Jefferson Parish alone, that law cost the public school system over \$14 mil-

lion a year, leading to cuts in discretionary programs like art, physical education, and other services for school children. The new money for health care had to come from the relatively small portion of the budget that is not tied to other state mandates or union contracts.

Teachers' associations oppose the proposed amendment because it would not exempt teachers' salaries and benefits from the prohibition on unfunded mandates. It is unclear, however, whether the amendment will provide significant protection against unfunded mandates for salaries or in other areas. Most mandates come in the form of rules and regulations from the State Department of Education, the State Board of Elementary and Secondary Education (BESE) or federal laws like No Child Left Behind. Increases in salaries are often routed through the MFP. The MFP, federal or state laws implementing accountability programs, and rules, regulations and executive orders are not covered by the amendment.

Some opponents of the amendment claim that it would restrict the ability of the State to intervene in failing local school systems. They maintain that it would have prevented the Legislature from directing local funds from the Orleans Parish School Board to the Recovery School District. An offsetting argument is that, in an emergency situation, the Legislature could muster the two-thirds vote of each house needed to by-pass the restriction, as the Legislature did for the Recovery School District legislation.

BGR Position: FOR. While the amendment is of limited use, it would provide some needed protection against imposition of additional unfunded mandates on local school systems.

Constitutional Amendment No. 11: Homestead Exemption, Revocable Trusts

What it would do

The proposed amendment would extend the homestead exemption to property owned by any type of trust when:

- Those who set up the trust are the principal beneficiaries, owned and occupied the property before establishing the trust, and remain the occupants.
- The home would have been eligible for the homestead exemption were it not in the trust.

Analysis and Impact

In November 2004, voters approved a constitutional amendment that granted eligibility for a homestead exemp-

tion to property held in an irrevocable trust, subject to the above conditions. The proposed amendment would expand the exemption to revocable and other trusts.

A trust is a legal "box" in which a person's assets may be stored. Establishment of a trust may provide income tax benefits for the grantor or beneficiaries. Revocable trusts are popular in place of wills as a means of avoiding or minimizing probate, particularly in jurisdictions with burdensome probate costs and procedures. (Probate is the legal process to supervise the management and settlement of the estate of the person who died, including the collection of assets, the allowance of claims, and the disposition of the estate.)

In addition, during a person's lifetime such trusts provide a convenient vehicle to manage assets and, in the event of incapacity, a less expensive alternative to a guardianship. If the trust is irrevocable, the person who set up the trust may remove and sell an asset only with permission of the beneficiaries of the trust. If the trust is revocable, the person may cancel the trust and have access to the assets without permission from the beneficiaries.

This amendment would place all types of trusts on an equal footing for property tax purposes. The argument is that, as long as the same people continue to live in the home, a right to a homestead exemption or special assessment rate should not be lost because homeowners have availed themselves of a common estate- or tax-planning mechanism.

If voters approve the proposed amendment, estate planning may proceed without regard to a choice between the loss of control required by an irrevocable trust and the loss of the homestead exemption that comes with a revocable trust. The proposed amendment would permit an owner to both establish a revocable trust and to keep the tax savings allowed by his homestead exemption.

The effect on tax recipient agencies would depend on the number of homes held in revocable trusts. In New Orleans, tax income of about \$1,300 per eligible property would be lost to tax recipient bodies.

BGR Position: AGAINST. As BGR has stated before, the homestead exemption should be eliminated or applied restrictively on a needs basis. Expanding coverage is a move in the wrong direction.

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