



ON THE BALLOT

A Report from the Bureau of
Governmental Research

Jefferson, Orleans and State Propositions, November 2008

ON NOVEMBER 4, voters in the New Orleans area will face an array of local propositions and proposed amendments to the state constitution. This report focuses on two local propositions in New Orleans and Jefferson Parish and the seven constitutional amendments.

Local Propositions. The proposition in New Orleans would amend the city charter to make comprehensive changes to planning and land use decision making in the city. The proposition in Jefferson would expand the permissible uses of an existing sales tax to include drainage improvements.

State Issues. The state constitutional amendments take on a variety of issues. They include:

- Imposing term limits on members of certain state boards and commissions.
- Increasing the notice period for extraordinary sessions of the Legislature.
- Providing temporary replacements for legislators called to active military duty.
- Dedicating a greater amount of severance tax revenues to the parishes that generate them and creating a special fund for the Atchafalaya Basin region.
- Allowing a property owner to transfer a tax assessment freeze to a new property under certain conditions.
- Exempting blighted property from certain restrictions on expropriation.

- Allowing the state and local governments to invest funds for certain post-employment benefits in equities.

In this report, BGR provides analysis and takes a position on each proposition.

New Orleans Charter Amendment: Planning

What it would do

The proposed amendment to the Home Rule Charter of the City of New Orleans would make significant changes in the arena of planning and land use decision making. It would:

- Set forth the general contents of the City's master plan and processes for creating and amending the plan.
- Give the master plan the force of law.
- Require the City Council to establish a system for neighborhood participation in planning and land use decision making.
- Require members of the City Planning Commission and Board of Zoning Adjustments to undergo training.

Analysis and Impact

Background. Planning and land use decisions have for years caused discontent in New Orleans, among both those focused on economic development and those who feel deprived of a meaningful voice in decisions affecting their neighborhoods. In a 2003 study of the problem, BGR found that land use decisions do not

emerge from a fair, rational or consistent process, and that the City Council holds unbridled discretion in important areas. It also found that neighborhoods lack an adequate voice in their future.¹

In 2006, BGR produced a follow-up report presenting proposed text changes to the charter, geared toward ensuring rational decision making and enhancing neighborhood involvement. It proposed limiting the City Council's discretion in several ways, including giving the master plan the force of law and transferring the power to decide conditional uses to the City Planning Commission. Because these changes would increase the responsibilities and powers of the City Planning Commission, BGR recommended changes to its appointment process. It also proposed a broad structure for neighborhood participation to connect planning and land use decision making to affected citizens.

The two central elements in BGR's proposal – giving the master plan the force of law and creating a system for neighborhood participation – are included in the current proposal. Despite changes from its proposal, BGR staff worked extensively with the authors of the current charter revision, as well as legal experts and City Planning Commission and City Council staff, to help craft the best possible product.

The Master Plan. Giving the plan the force of law does not mean that the plan becomes a law. Rather, it means that land use laws and decisions, and other government actions, must conform to it. In essence, the master plan becomes the template that guides development.

The proposed amendment comprehensively addresses the formulation, amendment and effect of the master plan. Specifically, it would:

- Require the City Planning Commission to prepare a 20-year master plan with elements such as land use, transportation, housing, community facilities and infrastructure, and historic preservation.
- Require the City Council to adopt the plan by ordinance, adopt it with modifications or reject it. Before making modifications or rejecting the

plan, the Council would be required to seek comment from the City Planning Commission on proposed modifications or rejection.

- Allow the City Planning Commission to amend the master plan no more frequently than once per year. The Commission would have to hold public meetings, including one for neighborhoods affected by proposed amendments. Amendments would require City Council approval. The Council would have to refer proposed modifications of amendments to the Commission.
- Require that the city's Comprehensive Zoning Ordinance and zoning map as well as any other land use laws conform to the master plan.
- Require that the city's Capital Improvement Plan conform to the master plan.
- Require that all land use decisions (on such proposals as conditional uses, zoning changes, subdivisions and variances) conform to the land use element of the master plan.
- Require the city to fund the master plan.

Supporters of the proposed charter revision posit that it would rationalize land use decision making. With legal force, the plan would become a common script for public officials, developers and residents. Land use decisions would be made more consciously, since they would have to be weighed against the plan. Since the city could amend the plan only once per year, changes would likely attract greater public scrutiny.

Supporters argue that the planning process must be changed in order to produce a plan that reflects the will of the citizens and to make public officials and private citizens follow it. If citizens fail to approve the charter changes, they say, the dysfunctional, special-interest-driven planning process that has plagued this city for decades will continue. Once more a study will be completed, placed on a shelf and forgotten; once more taxpayer funds will have been squandered; and once more citizens will have wasted their time and received little or nothing in return.

However, there are risks to giving the master plan the force of law. The plan will be a good guide only insofar as it reflects good planning standards and the aspirations of the citizenry. This, in turn, requires active citizen engagement. It also requires that planners honor the vision citizens express, rather than follow their own or others' agendas. And it requires responsible stewardship by the City Planning Commission. Without such efforts, citizens could be left with a powerful plan that guides decisions against their interests.

Critics of the proposed revisions have raised the concern that the charter amendment is premature. They maintain that it would be better to wait until the master plan is complete to determine whether citizens want it to have the force of law. This approach would have the effect of making the charter amendment a referendum on a completed master plan.

Supporters stress that the charter amendment is about changing the process, not about approving a specific plan. They argue that New Orleans, having gathered so many ill-fated plans under its belt in recent years, cannot afford to begin another planning process without some assurance that the final product will be effectual. They posit that citizens, fatigued by multiple meaningless planning processes, will be loath to participate in the shadow of such uncertainty.

Neighborhood Participation. Meaningful, neighborhood-level participation is critical in crafting the master plan and in on-going decision making. The proposed charter revision addresses the issue by requiring City Council to pass an ordinance that:

- Creates a system for organized and effective neighborhood participation in land use decisions and quality of life issues.
- Provides for meaningful neighborhood participation in the formulation of the master plan and any amendment to the plan.
- Provides for timely notice of proposed land use actions to affected neighborhoods.

- Provides those neighborhoods with an opportunity to comment on the proposals.

If voters approve the proposed charter revision, the City Council will have 18 months to craft the neighborhood participation ordinance. Citizens will have to monitor proposals closely to ensure that they provide effective, meaningful and relevant neighborhood participation mechanisms.

Decision-Making Bodies. The proposition would require that members of both the City Planning Commission and the Board of Zoning Adjustments submit to six hours of orientation training and six hours of continuing education annually, on pain of removal.

The amendment's proponents say the additional hours of training will help ensure that the Commission and Board consist of committed, well-informed members. This would be particularly important for the Commission in light of its increased responsibilities under the amendment.

BGR Position:

FOR. The proposed charter revision is the necessary first step toward rationalizing land use decision making and enhancing neighborhood participation.

Jefferson Parish Proposition: Sales Tax Rededication

What it would do

In 1984, voters in Jefferson Parish approved a parish-wide 1% sales tax. They dedicated seven-eighths of the tax collected in the parish's unincorporated area, as well as all of the tax collected in the Town of Jean Lafitte, solely to sewerage improvements.² In 1998, voters extended the tax to 2022 and expanded permissible uses to include roads. The proposition before the voters would add drainage improvements to the list of permitted uses.

Analysis and Impact

The dedicated sales tax was originally used to fund a major program of sewerage improvements mandated by the U.S. Environmental Protection Agency. As those improvements neared completion, the parish undertook a major program of road improvements.

A large portion of the tax proceeds – approximately \$30 million a year – is committed to pay debt service on the bonds issued to support the sewer and road improvements. If the rededication is approved, revenue in excess of debt service costs could support new road, sewer or drainage projects. The parish plans to use part of the excess to support a \$50 million bond issue to fund an initial round of drainage projects. The parish projects that the tax will generate total revenue of \$43 million in 2008.

Drainage is one of the most significant issues facing Jefferson Parish. Although federal funds have improved levees, major canals and pumping stations, they cannot be used to address deficiencies in the local network of underground pipes, drains, culverts and ditches. These deficiencies hamper the process of draining storm water from neighborhood streets. Periodic heavy rainfalls have produced widespread flooding.

The proposition would allow the parish to fund a wide range of drainage projects, including the construction of drains, drainage lines, canals, ditches, pumps and pumping stations, and the acquisition of lands needed for public drainage purposes. However, the parish intends to focus on localized drainage problems that afflict many neighborhoods. A prime target will be the replacement of low-capacity pipes installed in areas that were developed before the parish adopted drainage design standards in 1981.

The goal is to upgrade the local drainage infrastructure to a level that can handle the impact of a 10-year storm, the current standard for the parish's drainage canals and pumps. The parish's Drainage Department estimates that the system-wide upgrade would cost \$800 million to \$1 billion and take at least 10 years to complete.

In preparation for the drainage improvements, the

parish is conducting a comprehensive drainage study for each side of the Mississippi River. Engineers have begun to identify areas that suffer from localized drainage deficiencies, such as substandard pipes in older neighborhoods. Eventually, the parish will prioritize sales tax-funded improvements in those areas most susceptible to frequent flooding. These improvements will be coordinated with drainage improvements made by municipalities.

The prospective improvements require local funding because they do not qualify for the federal government's Southeast Louisiana Urban Flood Control Program (SELA). This program, initiated after the May 1995 flood, involves a series of improvements to major canals and pumping stations. The federal government has funded the entire cost of the project in some cases, and 75% of the cost in others. The parish has covered the balance, primarily through a 4.43-mill property tax.³ Parish officials believe that the local improvements will amplify the benefits of the SELA projects.

In 2008, the parish budgeted approximately \$18 million in local drainage improvements: \$11 million for debt service and \$7 million for drainage capital improvements. The debt service repays drainage improvement bonds issued in 1997 and post-Katrina borrowings to build safe houses for pump station operators and essential personnel for use during severe weather. These capital funds are in addition to the Drainage Department's budget for maintenance and operations.

The rededication would loosen a problematic constraint on government resulting from the dedication of the tax. If the proposition fails, tax proceeds will remain restricted to road and sewerage improvements. These systems have already benefited from major upgrades, while many local drainage needs remain unaddressed. By expanding the possible uses of the dedicated tax revenue, the proposition will give the parish the flexibility to direct funds to the greatest infrastructure needs.

The major uncertainty behind the parish's tax rededication proposal is that the drainage studies are still in progress. The parish has not finalized a list of construction projects.

BGR Position:

FOR. The proposition will provide Jefferson Parish with greater flexibility in infrastructure spending and free up funds to address pressing local drainage needs.

**Constitutional Amendment
No. 1: Term Limits**

What it would do

The proposed amendment would impose term limits on members of the following boards and commissions:

- Louisiana Public Service Commission
- Louisiana State Board of Elementary and Secondary Education (BESE)
- Louisiana Board of Regents
- University of Louisiana System Board of Supervisors
- Southern University System Board of Supervisors
- Louisiana State University System Board of Supervisors
- Board of Supervisors of Community and Technical Colleges
- Forestry Commission
- State Civil Service Commission
- State Police Commission

The amendment would impose two types of restrictions:

Length of Time. A member who has served more than two and a half consecutive terms on a board or commission would not be eligible for election or appointment to a succeeding term on that board or commission. For example, a member of the Forestry Commission who had served three terms on that body

could not be reappointed to a fourth.

Cross-Entity. Any person who has served on one or more of the listed commissions for more than two and a half terms over the course of three terms could not be elected or appointed to any of the other listed boards for a period of two years afterward. For example, a member of the Forestry Commission who had served three terms on that body could not be appointed immediately thereafter to another listed board or commission.

In the case of current members, the term limits apply to future terms. They do not apply to ex officio members.

Analysis and Impact

This year, the Legislature enacted a law imposing term limits on members of boards and commissions within the Executive Branch.⁴ However, the authors of that law had concerns that term limits could not be imposed by statute on certain boards and commissions created by the constitution. As a result, they introduced the proposed amendment. The limits in the proposed constitutional amendment are similar, but not identical, to those set forth in the statute.

The boards and commissions included in the amendment serve a wide range of purposes. Five of them deal with some aspect of higher education. Two oversee the administration of civil service systems. One regulates public utilities, another sets policies for elementary and secondary schools, and another oversees timber resources.

The boards and commissions differ in their methods of selecting members. The members of the Louisiana Public Service Commission are elected. Some of the members of BESE are elected, while others are appointed by the Governor. In the case of the other boards, the Governor appoints most or all the members.

Most states impose term limits on at least some government officials. Thirty-seven states limit the number of terms that a governor may serve. In Louisiana, a governor who has served for more than one and a half consecutive four-year terms cannot run for the next

term.⁵ Fifteen states, including Louisiana, impose term limits on their legislators.

While many states have term limits for certain boards or commissions, BGR found only three with any type of blanket term limits. Hawaii limits all appointed members of executive boards and commissions to two consecutive terms.⁶ Vermont limits all professional regulatory bodies to two consecutive terms.⁷ Colorado limits all elected officials at the county, city and state level to no more than three consecutive terms.⁸

Proponents of the amendment assert that term limits would bring greater diversity of background and experience to the boards and commissions by more frequently changing the members. It would also allow a greater number of citizens to serve.

Opponents contend that term limits would strip a body of its institutional memory and unnecessarily deprive citizens of the services of officials with demonstrated abilities. The amendment would also limit the pool of qualified candidates for the appointed boards in question.

The strongest argument for term limits – that they prevent entrenchment of politicians – applies to elected bodies, such as members of the Public Service Commission. It does not apply to the appointed bodies covered by the proposed amendment. Nor does the counterargument: that voters have the power and the responsibility to turn out corrupt or ineffective officials. While both arguments deserve consideration in the context of elected officials, they are simply not relevant to appointed office holders.

Leaving aside the question of whether term limits are desirable, it is not even clear that such limits are necessary. As it stands, a governor serving the maximum of eight years could appoint a board member or commissioner only twice. Thus, a mechanism to reduce the likelihood of entrenchment on appointed bodies is already in place.

The proposed constitutional amendment goes far beyond other blanket term limit provisions in that it prevents a holder of one office or position from immediately holding another. The cross-entity restriction is

the equivalent of preventing a councilmember from running for mayor based on the number of years of service on the council. The proponents of the bill have not offered a credible argument for this provision, and BGR has not been able to identify one. BGR is not aware of any state law like the one proposed.

BGR Position:

AGAINST. The proposed amendment is poorly conceived and overly broad.

Constitutional Amendment No. 2: Special Sessions of Legislature

What it would do

Constitutional Amendment No. 2 would increase the amount of notice required to call an extraordinary session of the state Legislature from five days to seven calendar days.

Analysis and Impact

The Legislature convenes in Baton Rouge for regular annual sessions. The Legislature also convenes for extraordinary, or special, sessions called either by the Governor or by the presiding officers of both houses upon a written petition of a majority of the elected members of each house.

The constitution currently requires the Governor or the legislative leaders to issue a proclamation calling a special session at least five days prior to its start. According to the bill's sponsor, prior administrations have given five full days of notice. They have not counted the day of the proclamation or the day the session begins in the notice period. This year, the Governor apparently included one of those days as part of the notice period, leaving the Legislature with only four full days of notice.

While the proposed amendment would increase the notice period, it would not resolve the issue of which days should be included in that period.

The amendment would give the legislators and the public more time to prepare for a session. However, enshrining a longer period in the constitution may unnecessarily impede the Legislature's ability to act in true emergency circumstances.

BGR Position:

AGAINST. The notice issue is too insignificant to warrant a constitutional amendment. The public would be better served if the matter were resolved through dialog between the Governor and the Legislature. In addition, there may be times when it is useful for the extraordinary sessions to be called on five-day notice.

Constitutional Amendment No. 3: Temporary Replacement of Legislators Called to Military Duty

What it would do

This amendment would require the Legislature to establish a procedure to appoint a temporary replacement for a legislator called to active military duty. The amendment would activate companion legislation setting forth the appointment procedure.

Analysis and Impact

More than a dozen state legislators around the country have been called to active duty in the military to serve in Iraq, Afghanistan and elsewhere since September 11, 2001.⁹ Currently, Louisiana has at least three reservists in the Legislature, including the author of the amendment.

When a reservist is called to active duty, the length of service depends on the circumstances under which he is called. If an emergency or war has been declared by Congress, he may be called to active duty for the duration of the war or national emergency, and for six months afterwards.¹⁰ The President or Congress can set a shorter length of service within that period. If an emergency has been declared by the President, active duty is limited to 24 consecutive months.¹¹ The

President is also authorized to call reservists to active duty for up to 365 days to augment or support a mission for specified purposes.¹² In all cases, the Secretaries of each branch of the military have the discretion to set a shorter duration of service within these limits.

Military and legislative rules prevent a legislator in active military service from exercising the duties of his elected office. The military prohibits active-duty soldiers from engaging in political activity, unless the call to duty is for less than 270 days and the duties of his elected office do not interfere with his military duties.¹³ The Legislature, meanwhile, requires physical attendance to vote¹⁴ and regular attendance at committee meetings.¹⁵ Once ordered to active duty, a legislator would miss votes and committee meetings.

In Louisiana, nothing requires a legislator to resign if he is called to active duty. Each house of the Legislature regulates the conduct of its own members, including attendance and expulsion.¹⁶ Pursuant to this authority, the Legislature has enacted rules giving it the discretion to grant a leave of absence or to expel a member for excessive absence.¹⁷ Granting a leave of absence would leave an active-duty legislator's constituents without representation during military service.

Proponents of the amendment assert that legislators should be encouraged to serve their country, not penalized for it. However, if the legislature grants a leave of absence or takes no action, the district is left without representation. The proposed amendment seeks to reconcile the interest of the legislator with those of his constituents by allowing a temporary replacement.

Opponents of the amendment are primarily concerned that it is inconsistent with the people's fundamental right to elect their representatives. Generally, voters elect their representatives with the understanding that they will serve and that if they cannot, they will resign and a special election will be held for a replacement. Otherwise, the legislator's seat could be empty for as long as the duration of his term.

Historically, legislators have resigned from their seats to serve in the military, either on their own initiative or because of action by the president. For example, during

World War II, President Roosevelt issued a directive to the Secretary of War and Secretary of the Navy ordering all members of the House and Senate who were serving on active duty to be placed on inactive duty.¹⁸ It had the practical effects of barring sitting members of Congress from joining the active services and of requiring those members already in service to declare their intention to remain in Congress or resign their seats.

Congressional rules do not specifically address military service of sitting members. On four occasions in the last 200 years, Congress has considered whether to vacate the seat of a member who had accepted a military commission. It chose to vacate a seat only once, in 1803.¹⁹

The federal government and Louisiana have enacted nondiscrimination laws that, among other things, require employers to reinstate employees called to active duty after their service ends.²⁰ There are no court decisions addressing whether the laws cover elected officials.

At least nine states (Alabama, Florida, Indiana, Iowa, Kansas, Montana, South Carolina, Tennessee and Virginia) have adopted legislation to provide for temporary replacement of elected legislators called to active duty.²¹ It is unclear whether Louisiana needs a constitutional amendment to pass a similar law.

Some statutes pertaining to temporary appointments place the appointment power with a third party or contemplate that a special election will be called. In Louisiana, the companion legislation to this amendment requires a legislator called to active duty for more than 180 days to submit a list of at least three candidates to be interviewed by a panel from the house in which he serves.²² The Senate president or House speaker then selects the temporary successor from the nominees.

Finally, there may be other situations in which a member is unable to fulfill the responsibilities of his office for reasons beyond his control, e.g., a prolonged illness. The amendment could set a precedent for seeking constitutional exceptions in those cases.

BGR Position:

AGAINST. BGR appreciates the sacrifices made by

military personnel. However, an individual's interest in maintaining a legislative seat is outweighed by his constituents' right to elect the individual who represents them. The responsible course of action for a legislator called to extended military duty is to resign.

Constitutional Amendment No. 4: Mineral Severance Tax Allocations

What it would do

Currently, the constitution dedicates 20% of severance tax revenue, up to a maximum of \$850,000 per year, to the parish in which the production or severance occurs.²³ The \$850,000 cap is adjusted annually for inflation.

Constitutional Amendment No. 4 would raise the cap by \$2 million over a two year period. Thereafter, the cap would be adjusted for inflation based on the Consumer Price Index (CPI). It would also require the parishes to spend on transportation-related projects at least 50% of any increase in its severance tax revenues over receipts as of the fiscal year ending June 30, 2008. For example, if a parish received \$600,000 in 2008 and \$1 million in 2011, the parish would have to spend \$200,000 on transportation projects.

The amendment would also create the Atchafalaya Basin Conservation Fund to be administered by the Louisiana Department of Natural Resources. It would dedicate to the fund 50% of severance tax revenue generated from state land in the Atchafalaya Basin. The dedication would be calculated based on the amount remaining after the parish allocations, constitutionally required deposits to the State's bond fund and allocations to the Louisiana Wildlife and Fisheries Conservation Fund. The dedication is capped at \$10 million per year.

Analysis and Impact

Severance tax revenues have been allocated to producing parishes since at least the 1920s.²⁴ Voters increased maximum severance tax allocations to \$500,000 in 1990, to \$750,000 in 1998 and to \$850,000 in 2006. The 2006 amendment also linked the maximum allocation to the

CPI starting in 2008. The intent was to allow for automatic increases to the statutory maximum without requiring voters to amend the constitution. The inflation adjusted level for 2008 is \$875,000.

All 64 parishes in Louisiana receive some mineral severance tax revenue. Orleans Parish's 2008 allocation of \$8,104 was one of the lowest in the region. In contrast, Plaquemines, Jefferson and St. Bernard parishes received the maximum allocation.

Only 30 parishes would enjoy greater allocations as a result of the proposed amendment. The other 34 parishes, including Orleans, St. Charles, St. John and St. Tammany parishes, do not have sufficient production to exceed the current cap.²⁵

Six of the parishes in the Atchafalaya Basin are projected to gain \$5.9 million per year from the increase in the parish-based allocation alone. That region would further benefit from the new dedication to the Atchafalaya Basin Conservation Fund. The fund would help fund floodway system and conservation projects in the Atchafalaya Basin, some of which are already underway. These projects have historically been funded through appropriations. The Legislative Fiscal Office expects the fund to receive the \$10 million maximum in each of the next five years.

Proponents of the dedication point to the disproportionate impact oil and gas production has on parishes that produce these resources. The local governments often bear the burden of supporting the public infrastructure necessary for production and exploration.²⁶ The additional revenue would help local governments meet that burden.

On the other hand, the state has a multitude of other funding needs, such as health and education. The state's flexibility and ability to meet these needs is already seriously constricted by statutory dedications and mandatory expenditures. The Legislative Fiscal Office estimates that the proposed dedication would cost the General Fund approximately \$205 million over the next five years.

State revenues have recently been high due to record oil

prices and recovery-related income and expenditures. State economists warn that these conditions will level out, resulting in a projected budget deficit by 2010.²⁷ The state's official forecast for severance tax revenues in 2009 is \$843 million, down from \$945 million in 2008.²⁸

BGR Position:

FOR. Parishes that produce natural resources bear the brunt of infrastructure and environmental damage. These parishes are entitled to a larger share of mineral severance tax revenues to mitigate this damage.

Constitutional Amendment No 5: Special Assessment Levels

What it would do

The proposed constitutional amendment would allow an eligible homeowner whose home is sold to or expropriated by the government to transfer his assessment freeze to another property. The new property must meet the following conditions:

- It must be purchased within two years of the expropriation or sale of the original property.
- It must be "similar in nature" to the original property.
- It must have a fair market value no more than 200% of the fair market value of the original property.
- It must be "intended to replace" the original property.

Analysis and Impact

The state constitution allows certain homeowners to apply for a special property tax assessment.²⁹ A special assessment freezes the taxable value of the property. Future increases in value go untaxed, resulting in a tax saving as the value of the property rises.

The assessment freeze is available to certain home-

owners who are over 65, certain disabled citizens, certain members of the military and surviving spouses.³⁰ The freeze is permanent unless the property is transferred or improvements to the property exceed 25% of property value.³¹ Income restrictions apply.³²

Currently, a homeowner loses his special assessment if his home is expropriated or sold. He can apply for a new special assessment on the replacement property, but the taxable value is frozen at the new value, which could be higher. The proposed amendment would allow the homeowner to keep the special assessment level of the original property if the government expropriates or buys it.

It is not possible to determine how many properties the amendment would affect or how it would impact local taxing bodies. About 20% (15,346) of homesteads in Orleans Parish currently receive special assessments.³³ Seven percent of homesteads in St. Tammany Parish,³⁴ 24% in Plaquemines Parish and less than 2% in St. Bernard Parish have a special assessment.³⁵ State and local governments in the region are currently undertaking efforts to purchase or expropriate flood damaged or derelict properties. The New Orleans Redevelopment Authority has expropriated 150 properties since Hurricane Katrina and has 600 expropriation cases pending. In Orleans Parish alone, 4,000 properties have been voluntarily sold to the state through the Road Home program.³⁶ More than 4,000 Road Home properties in Jefferson, Plaquemines, St. Bernard, St. Charles and St. Tammany parishes have been sold to the state.³⁷

According to the bill's sponsor, the amendment was intended to mitigate the financial impact of expropriation. However, the amendment goes much further: it would provide a special benefit to people who voluntarily sell their homes. An argument can be made that a person who involuntarily loses his home through expropriation should not have to pay higher taxes for an equivalent property. That argument does not apply where the sale is voluntary. In addition, allowing the homeowner to transfer the original assessment level to a property with a higher fair market value may result in a windfall.

The amendment suffers from vague terminology that could lead to interpretive problems. The determinations that the replacement property be "similar in nature" and "intended to replace" the former homestead would be left to the assessor.

BGR Position:

AGAINST. The amendment expands a tax benefit at the expense of local governments.

Constitutional Amendment No. 6: Expropriation

What it would do

In 2006, Louisiana voters approved a pair of constitutional amendments that limited the power of state and local government to expropriate private property and set forth restrictions on the transfer of expropriated property to a private party. The proposed amendment would remove the transfer restrictions in the case of blighted property.

Analysis and Impact

The expropriation provision of the state constitution was amended in 2006 to limit the power of the state and its political subdivisions to take property from private owners in exchange for compensation. As in other states, change came in reaction to the U.S. Supreme Court's 2005 decision in *Kelo v. New London*.³⁸ The decision allowed the City of New London to take non-blighted property to implement a carefully considered economic redevelopment plan and to transfer it to private entities for redevelopment. Property rights advocates feared that this would open the way to abuse, namely that wealthy and well-connected private interests would benefit at the expense of average citizens.

The 2006 amendments imposed several limitations on government's expropriation powers by:

- Expressly and narrowly defining the "public purposes" for which government can expropriate property.

- Prohibiting the state or its political subdivisions from expropriating property for predominant use by a private person or for transfer of ownership to a private party.³⁹
- Adding transfer restrictions. Specifically, the expropriating entity can sell or lease expropriated property only by public bid, and only after the original owner is given a right of first refusal.⁴⁰

Expropriation is an essential tool for redevelopment, especially in the flood-ravaged parishes of south Louisiana. Prior to Katrina, in New Orleans alone, there were an estimated 15,000 to 20,000 derelict properties. The disaster of 2005 damaged tens of thousands of housing units in New Orleans. It is unknown how many of these properties are currently derelict. Only about 3,000 have been declared legally blighted and even fewer (150) have been expropriated since Katrina.⁴¹

The 2006 amendments severely restricted the government's capacity to expropriate blighted properties. BGR took a position against the amendments because they were clumsily drafted and would unnecessarily complicate important post-Katrina blight remediation and redevelopment.⁴² Two provisions are particularly problematic: the blanket prohibition on expropriation of property for subsequent transfer to or use by a private party, and the requirement that the government first offer it back to the original owner – the party responsible for the blight in the first place.

Amendment No. 6 attempts to correct some of the problems with the 2006 revisions by exempting blighted properties from the resale restrictions. The proposed amendment does not, however, address the blanket prohibition against transfer to a private party or for private use. As a result, even if the amendment passes, it may not be possible for government to expropriate a blighted property and transfer it to a private party.

In a recent case in Civil District Court, the New Orleans Redevelopment Authority (NORA) sought to test how courts would apply the 2006 amendments to takings of blighted property. In that case, NORA pre-

vailed in its argument that the private transfer prohibition and the transfer restrictions do not apply to properties expropriated for the purpose of removing a threat to public health or safety. However, the case is on appeal, and the same provisions could be interpreted differently by the appeals court.

BGR Position:

FOR. While the amendment does not address all of the flaws and ambiguities in the current expropriation provisions, it takes a step in the right direction by removing blighted property from the resale restrictions imposed in 2006.

Constitutional Amendment No. 7: Investments in Equities

What it would do

The proposed amendment would authorize the state and its political subdivisions to invest funds set aside for post-employment benefits, other than pensions, in equities. In this report, we refer to these benefits as Post-Employment Benefits.

Background

Many governments provide retired employees with Post-Employment Benefits, such as health and life insurance. Most government employers have taken a pay-as-you-go approach, paying the costs only when they come due during an employee's retirement. Few have set aside reserves to meet the future obligation. Nationally, the collective unfunded liability has been estimated at more than \$1 trillion.

New national accounting rules, which took effect for large local governments in 2007,⁴³ require governments to account for the cost of Post-Employment Benefits during employees' years of service, rather than waiting until the benefits are due. To do this, the government must estimate the annual amount needed to cover the cost of benefits earned by employees during the year and to amortize any unfunded liability

related to benefits earned in prior years.⁴⁴ The rules do not require a government to set aside assets equal to that amount, but to the extent it does not, it must record a separate liability on its balance sheet.⁴⁵

In 2007, the Louisiana Legislature authorized political subdivisions to establish trusts to fund the Post-Employment Benefits.⁴⁶ In 2008, it set parameters for the investment of the trust fund assets.⁴⁷ Also in 2008, it created a Post-Employment Benefit trust fund for the state and set parameters for its investments.⁴⁸

The 2008 law applicable to political subdivisions permits them to invest trust assets in the following types of equity securities: the stock of corporations traded on the New York Stock Exchange (NYSE), American Stock Exchange (AMEX) or NASDAQ System; and shares of mutual funds or exchange-traded funds that have at least 90% of their assets invested in securities permitted by the law's investment parameters.⁴⁹ It imposes other limitations, including specific caps on equity investments. A political subdivision may not invest more than 55% of a trust's total portfolio value in equities. In addition, the trust may not own more than 5% of the stock of any company, maintain more than 10% of its equity investments in any single company or concentrate more than 15% of its equity investments in any single industry. In order to activate the equity investment provision in the 2008 law, the proposed constitutional amendment is needed.

The law governing the state trust fund provides that, if the constitution permits, the fund may make equity investments as authorized for the state's Millennium Trust Fund.⁵⁰ The passage of the proposed amendment would provide the necessary permission, allowing the trust to invest in the stock of corporations traded on any registered U.S. stock exchange, as well as shares of mutual funds and investment trusts that hold such stock in their portfolios. These investments would initially be limited to 35% of the market value of trust fund assets. The cap could be raised to 50% by a two-thirds vote in each house of the Legislature.

Analysis and Impact

The ballot proposition asks voters to amend the section

of the Louisiana constitution that prohibits the state and its political subdivisions from investing in the stock of any private enterprise, subject to certain exceptions.⁵¹ The general prohibition, which dates back to the 19th century, is intended to prevent the investment of public funds in risky ventures and to block political cronies from dumping worthless stock on government entities.⁵²

The constitution includes certain exceptions to this general prohibition. For example, it allows the Millennium Trust Fund, the Medicaid Trust Fund and state-funded endowments for universities to make equity investments.

Pension funds for public employees are also free from the prohibition. This is because the retirement systems are not considered political subdivisions of the state, and the funds held by them are not considered public or state funds.⁵³ Louisiana law allows state and statewide pension funds to invest up to 65% of their total portfolio in equities, as long as at least 10% of the portfolio is invested in one or more index funds to manage risk.⁵⁴

Proponents of the constitutional amendment argue that permitting Post-Employment Benefit trusts to invest in equities would allow the trust to create and maintain a balanced and broadly diversified portfolio. The inclusion of equities would also make it possible for the trusts to achieve a higher rate of return than would be possible with the types of investments currently permitted by law, such as U.S. Treasury obligations and investment-grade debt of U.S. corporations.

Post-Employment Benefit trusts, like pension funds, have a long-term investment horizon. This allows them to bear the short-term risk associated with equity investment. Equities typically outperform fixed-rate investments in the long term.⁵⁵ It is common to find that equity investments account for 25% to 70% of a pension fund's total portfolio.⁵⁶

The Government Finance Officers Association has issued a public policy statement addressing governing statutes for Post-Employment Benefit trust investments. It recommends that states adopt a "prudent per-

son” standard and avoid specific statutory restrictions such as legal lists and percentage limitations on particular asset classes. The association believes that these generally result in inferior returns in the long run.⁵⁷

Louisiana has in place a prudent person standard. Proponents of the proposed amendment argue that the combination of the prudent investment standard and the specific legal restrictions will provide sufficient flexibility to achieve investment returns and assure taxpayers that trust fund money will be appropriately invested.

Proponents further argue that prohibiting equity investment is likely to increase the unfunded portion of the Post-Employment Benefit liability and the annual amount needed to amortize it. This is because the total liability would be reduced by trust fund assets valued at a lower rate of return for a portfolio without equities, e.g., 4% instead of 7%.⁵⁸ Higher costs translate into greater strains on government budgets and greater burdens on taxpayers. With equity investments, the trust funds could grow more quickly to the point where investment income becomes a source for annual benefit payments, easing the burden on taxpayers.

BGR Position:

FOR. An equity component is appropriate and desirable for long-term trusts that fund Post-Employment Benefits. In the long run, careful equity investment is likely to increase the return and reduce taxpayers’ costs. The underlying prudent financial management standards and the investment restrictions will guide appropriate equity investment of trust funds.

End Notes

¹ *Runaway Discretion: Land Use Decision Making in New Orleans*, the Bureau of Governmental Research, October 2003.

² The remaining one-eighth collected in the unincorporated area goes to the Jefferson Parish Sheriff’s Office. The 1% tax collected in municipalities other than Lafitte is returned to those municipalities.

³ Last year, voters rededicated the tax to allow the parish to spend any revenues not needed for SELA projects on local drainage improvements.

⁴ Acts 2008, No. 875. The State of Louisiana’s website lists more than 500 boards and commissions in the executive branch (www.louisiana.gov/Government/Boards_and_Commissions).

⁵ La. Const. art. IV § 3(B).

⁶ Haw. Rev. Stat. § 26-34 (Lexis 2008).

⁷ Vt. Stat. Ann. tit. 3 § 129(b) (Lexis 2007)

⁸ Colo. Const. art. XVIII § 11 (Lexis 2007).

⁹ Kathleen Hunter, “Warrior-Legislators Face Dilemma: Give Up One Job?,” Stateline.org (Aug. 4, 2004).

¹⁰ 10 U.S.C. § 12301 (Lexis 2008).

¹¹ 10 U.S.C. § 12302 (Lexis 2008).

¹² 10 U.S.C. § 12304 (Lexis 2008).

¹³ U.S. Dept. of Defense Directive No. 1344.10 (Feb. 19, 2008).

¹⁴ House Rule 3 (1973) (current version at House Rule 4.1 (2008)); Senate Rule 5.1 (2008); Senate Rule 12.3 (2008).

¹⁵ House Rule 8 (1974) (current version at House Rule 14.8 (2008)); Senate Rule 13.3 (2008).

¹⁶ La. Const. art. II §§ 15, 16 (1812) (current version at La. Const. art. III, § 7 (1974)).

¹⁷ See n.14, 15, *supra*.

¹⁸ Presidential Directive, Memorandum to the Secretaries of War and Navy (June 17, 1942), Franklin D. Roosevelt Presidential Library.

¹⁹ Jack Maksell, *Incapacity of Member of the Senate*, Congressional Research Service (Dec. 15, 2006).

²⁰ Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301-4333; La. Rev. Stat. § 29:38 (Lexis 2008).

²¹ Ala. Code § 36-8-1 *et seq.* (Lexis 2008); Burns Ind. Code Ann. § 5-9-4-1 *et seq.* (Lexis 2008); Iowa Code § 69.1 *et seq.* (Lexis 2008); Kan. Stat. Ann. § 73-213 *et seq.* (Lexis 2006); Mont. Code Ann. § 10-1-1010 *et seq.* (2007); S.C. Code Ann. § 8-7-10 *et seq.* (Lexis 2007); Tenn. Code Ann. § 8-33-101 *et seq.* (Lexis 2008); Va. Code Ann. § 2.2-2802 *et seq.* (Lexis 2008).

- 22 It does not, however, place a time limit on the temporary appointment.
- 23 Louisiana levies a severance tax on production of natural resources taken from land or water bottoms within the territorial boundaries of the state. The amendment does not affect existing revenue sharing of sulphur, lignite or timber severance taxes, which account for less than 8% of tax collections. One-third of the sulphur and lignite severance tax up to \$100,000 and three-fourths of the timber severance tax are remitted to the parish. La. Const. art. VII, § 4(D)(2) (Lexis 2008).
- 24 La. Const. art. 4, § 2 (1921).
- 25 Orleans Parish receives one of the lowest dedications of mineral severance taxes in the state.
- 26 F. Carson Mencken and Nicole Flynn, *Oil and Natural Gas and Rural Local Government Finances in the Gulf of Mexico Region*, Southern Rural Sociology, Vol. 20, No. 1, 64-79 (2004). See also *Coast 2050: Toward a Sustainable Coastal Louisiana*, Louisiana Coastal Wetlands Conservation and Restoration Task Force and the Wetlands Conservation and Restoration Authority (1998).
- 27 Revenue Estimating Conference FY08 – FY 12, Legislative Fiscal Office (May 9, 2008) available at lfo.louisiana.gov.
- 28 *Id.*
- 29 La. Const. art. VII, § 18(G)(1) (Lexis 2008).
- 30 The special assessment remains on the property if the surviving spouse continues to own the property and meets specified age requirements. La. Const. art. VII, § 18(G)(2)(a) (Lexis 2008).
- 31 La. Const. art. VII, § 18(G)(3-4) (Lexis 2008).
- 32 La. Const. art. VII, § 18(G)(1)(a)(ii) and (iv) (Lexis 2008). This amount is adjusted yearly by the Tax Commission during its Rules and Regulations Session. See *Special Assessment Primer*, Louisiana Tax Commission available at www.latax.state.la.us.
- 33 Fiscal Note for H.B. 461 (Act 933), Legislative Fiscal Office (June 17, 2008).
- 34 This figure does not include special assessments related to military service, which BGR could not determine.
- 35 BGR was unable to determine the number of homesteads with special assessments in Jefferson Parish.
- 36 Road Home Situation and Pipeline Report (Sept. 16, 2008), available at www.road2la.org.
- 37 *Id.*
- 38 545 U.S. § 469 (2005).
- 39 La. Const. Art. I, § 4(B)(1)(a-b).
- 40 La. Const. Art. I, § 4 (H)(1-4) (Lexis 2008). If the government chooses not to offer the right of first refusal to the original owner or sell by public bid, it must hold the property for 30 years after which time it can sell the property as provided for by law.
- 41 For a full discussion on the blight/expropriation process see *Mending the Urban Fabric: Blight in New Orleans, Part II: Procedures for Successful Redevelopment*, Bureau of Governmental Research (April 2008) available at www.bgr.org.
- 42 For a more comprehensive analysis of the 2006 Amendments regarding expropriation, see *On the Ballot: Issues on the Ballot for September 30, 2006*, Bureau of Governmental Research (Sept. 18, 2006), available at www.bgr.org.
- 43 The rules are Governmental Accounting Standards Board Statement Nos. 43 and 45. Smaller governments will begin implementing the rules in 2008 and 2009. The rules became effective for the state in the fiscal year ending June 30, 2008.
- 44 The accounting rules allow unfunded liability to be amortized over a maximum of 30 years.
- 45 The employer pays the amount if it pays benefits, pays insurance premiums or transfers assets to a trust. It cannot simply earmark funds in its accounts. Transfers to trusts must be irrevocable, and trust assets must be dedicated to providing future benefits.
- 46 Acts 2007, No. 202. They may also establish or designate a board or commission to manage the trust fund.
- 47 Acts 2008, No. 87.
- 48 Acts 2008, No. 910.
- 49 An exchange-traded fund is an investment company that invests like an index fund and only issues large blocks of shares, usually to institutional investors. Investors purchase the blocks of shares with a basket of securities that generally mirrors the fund's portfolio. Investors can then split up the blocks and sell the individual shares to other investors on a stock exchange. "Exchange-Traded Funds," U.S. Securities and Exchange Commission (9/12/2008), available at <http://www.sec.gov/answers/etf.htm>.
- 50 La. Const. art. VII, § 10.8 (Lexis 2008); La. Rev. Stat. § 39:98.2 (Lexis 2008).
- 51 La. Const. art. VII, § 14 (Lexis 2008).
- 52 Lee Hargrave, *Limits on Borrowing and Donations in the Louisiana Constitution of 1975*, 62 La. L.Rev. 137, 146 (Fall 2001).
- 53 *Id.* at 147.
- 54 Local retirement systems are governed by separate, individual statutes, which may or may not impose specific limits on equity investment.
- 55 Miller, Girard, *Investing Public Funds*, 2nd ed. (Chicago: Government Finance Officers Association, 1998), p. 343.
- 56 *Id.*, p. 333.
- 57 Government Finance Officers Association, Public Policy Statement on Governing Statutes for Post-Employment Benefit Trust Investments, approved June 17, 2008.
- 58 Telephone interview with Lucius McGehee, senior vice president, Argent Trust, August 25, 2008. Also, Rush, David, "OPEB Trust Structures," presentation to NAST Treasury Management Conference, Dec. 3-6, 2006, p. 4.

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