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The Houses that Eminent Domain and Housing Tax Credits Built: Imagining a Better New Orleans

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The Houses that Eminent Domain and Housing Tax Credits Built: Imagining a Better New Orleans

Cover Page Footnote

Brown -- I would like to thank Florence Wagman Roisman, Judith Welch Wegner, and the Working Group on Property, Citizenship, and Social Entrepreneurism ("PCSE") for their helpful comments. Thank you to Penny Gibson and Creighton Miller with the University of Alabama School of Law library for their excellent research support and other assistance. I also owe special thanks to Patty Lovelady Nelson for her valuable time and editorial support. I especially thank my parents, Allen S. Brown, Jr. and Valerie J. Brown for their support. Williams -- I would also like to thank the PCSE Working Group for its helpful comments.

THE HOUSES THAT EMINENT DOMAIN AND HOUSING TAX CREDITS BUILT: IMAGINING A BETTER NEW ORLEANS

Carol Necole Brown* and Serena M. Williams**

Throughout its history, New Orleans has been largely immune to brilliant and innovative ideas. Indeed, this is one of its principal charms. If you are not a native New Orleanian, ask yourself why you decided to live here and chances are it has something to do with what Ignatius J. Reilly described as New Orleans’ “stagnation and apathy which I find inoffensive.”¹

*Still, she longs
for the Quarter—lights, riverboats churning,
the tinkle of ice in a slim bar glass.
Each night a refrain, its plain blue notes
carrying her, slightly swaying, home.²*

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1. R. Judson Mitchell, *The Wild Gas: Rebuilding New Orleans*, SOCIAL POLICY (2005-2006), available at <http://www.socialpolicy.org/index.php?id=1640>.

2. NATASHA TRETHERWEY, *Expectant, in DOMESTIC WORK: POEMS BY NATASHA TRETHERWEY* 17 (2000).

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I. INTRODUCTION

Proposals for investing in and rebuilding urban enclaves such as New Orleans are layered with controversy and difficulty. One of the most significant impediments to rebuilding New Orleans will be addressing the need to replenish the depleted rental housing market. Racial and economic integration of housing markets and appropriate use of private sector money to replenish the rental housing stock within a “reasonable” time period are indispensable components of a responsible revitalization and renewal plan.³

This Article contends that a combination of the smart exercise of eminent domain and of “housing production subsidies”⁴—housing tax credits—is necessary to rebuild the rental housing market in New Orleans. In a climate of appreciating markets, private developers do not have natural incentives to construct affordable rental housing.⁵ If provided the proper financial motivation, prescient developers will step in and invest in the New Orleans and regional rental markets. There is no guarantee that developers will reap huge profits in the affordable rental housing market, even under optimal market conditions. Certainly, post-natural disaster conditions—widely dispersed populations, high unemployment levels, devastated infrastructure, disorganization and finger-pointing, and

3. See Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747, 1801-03 (2005).

4. *Id.* at 1796.

5. INITIATIVE FOR REGIONAL & COMMUNITY TRANSFORMATION, RUTGERS UNIV., ENVISIONING A BETTER MISSISSIPPI: HURRICANE KATRINA AND MISSISSIPPI—ONE YEAR LATER 37 (2006), available at <http://www.naacp.org/news/press/Mississippi.pdf> (last visited Mar. 7, 2007) [hereinafter ENVISIONING A BETTER MISSISSIPPI].

a lack of a unified vision of what the reconstructed built environment should be—pose even greater uncertainties for developers.

A thoughtful approach to eminent domain, combined with strategic use of housing subsidies, can complement other aspects of regional comprehensive planning as New Orleans and the surrounding communities move forward. One of the most promising tools available to address rental housing needs is the Low Income Housing Tax Credit program (“LIHTC”).⁶ Created by the Tax Reform Act of 1986, the LIHTC is currently the most significant program that seeks to meet poor citizens’ needs for rental housing production and rehabilitation.⁷ LIHTCs increase the nation’s rental housing stock for the poor by targeting high-income taxpayers.⁸ The program “provides an incentive for the construction and rehabilitation of low income rental housing by lowering its overall cost through the use of tax credits to developers and owners of qualified rental projects.”⁹ The U.S. Department of the Treasury administers the program in conjunction with the housing finance agencies of the states and some cities.¹⁰ Having produced almost 1.3 million units of housing between 1987 and 2003, the LIHTC has eclipsed the public housing program and holds great promise as a program for increasing mixed-income housing and racial integration.¹¹

Though the LIHTC is a potentially useful program for addressing New Orleans’s present rental housing needs, the LIHTC, if not properly implemented, may also worsen the economic divide and concentrated housing for the poor that characterized New Orleans before Hurricane Katrina and the 2005 storm season. Improper

6. 26 U.S.C. § 42 (2006).

7. See Florence Wagman Roisman, *Keeping the Promise: Ending Racial Discrimination and Segregation in Federally Financed Housing*, 48 *How. L.J.* 913, 926 (2005).

8. *Id.* at 927.

9. *In re* Adoption of 2003 Low Income Housing Tax Credit Qualified Allocation Plan, 848 A.2d 1, 6 (N.J. Super. Ct. App. Div. 2004), *cert. denied*, 861 A.2d 846 (N.J. 2004); see also Statutorily Mandated Designation of Difficult Development Areas for Section 42 of the Internal Revenue Code of 1986, 65 *Fed. Reg.* 57,526 (Sept. 22, 2000).

10. Roisman, *supra* note 7, at 927.

11. JILL KHADDURI ET AL., ARE STATES USING THE LOW INCOME HOUSING TAX CREDIT TO ENABLE FAMILIES WITH CHILDREN TO LIVE IN LOW POVERTY AND RACIALLY INTEGRATED NEIGHBORHOODS? 1-2 (2006), available at http://www.prrac.org/pdf/LIHTC_report_2006.pdf (last visited Mar. 7, 2007) (report prepared for Poverty and Race Research Action Council and the National Fair Housing Alliance); see also Roisman, *supra* note 7, at 927 (discussing the approximate number of housing units the LIHTC program has added since its inception and discussing the LIHTC program’s historic impact, or lack thereof, on ameliorating racially and economically segregated housing).

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balancing of the allocation of housing tax credits can reinforce historic race and class segregation and may have a blighting effect on communities.¹²

Part II of this Article reviews the history of the New Orleans rental housing market. Parts III and IV of this Article examine eminent domain and LIHTC, highlighting the tensions inherent in using these doctrines to assist in providing affordable housing. Each part discusses potential tensions and social policy issues and demonstrates that the proper combination of both promises a stronger, more economically integrated, New Orleans. Part V concludes that by implementing the proposals set forth in this Article, policymakers and citizens, partnering together, can rebuild a better New Orleans.

II. A HISTORY OF THE NEW ORLEANS RENTAL HOUSING MARKET

The subsidized and unsubsidized rental housing stock in the New Orleans region must be *sensibly* redeveloped—a failure to do so will result in consequences that reverberate throughout the economy and the social fabric of New Orleans.¹³ “In the market-driven, status conscious society of [the] United States, affluent families live in different neighborhoods than poor families”¹⁴ And, to the extent this has resulted in an over-concentration of the poor and of subsidized rental housing in areas of New Orleans, the redevelopment efforts for the City should require other communities near

12. See, e.g., KHADDURI ET AL., *supra* note 11 (discussing state data on use of LIHTC to promote racial integration in housing); Robert Neuwirth, *Renovation or Ruin: Activists in Two States Make a Radical Charge: That America's Biggest Program to Finance Affordable Housing is Promoting Segregation and Blighting City Neighborhoods*, SHELTERFORCE ONLINE (Sept.-Oct. 2004), <http://www.nhi.org/online/issues/137/LIHTC.html> (discussing community groups in New Jersey and Connecticut that have challenged the implementation of the LIHTC program as racially biased and as contributing to community blight).

13. E.g., THE ROAD HOME HOUSING PROGRAMS, ACTION PLAN AMENDMENT FOR DISASTER RECOVERY FUNDS 17 (La. Recovery Auth. 2006), available at http://www.doa.la.gov/cdbg/dr/plans/ActionPlan-Approved_06_04_11.pdf (last visited Mar. 7, 2007) [hereinafter ACTION PLAN AMENDMENT]. “All sectors of the economy have reported a workforce shortage due to a lack of affordable housing.” *Id.*; see Joe Gyan, Jr., *N.O. Woman Blasts “Code Word” for Poor*, ADVOC. (Baton Rouge, La.), Sept. 15, 2006, at A1 (discussing the lack of trust in the government resulting from the 2005 storms and attempts to restore citizens’ trust through responsible housing assistance programs).

14. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 84 (1993).

New Orleans to integrate a modest portion of subsidized rental housing units into their neighborhoods.

Approximately 82,000 rental housing units in southeast Louisiana were destroyed or damaged last year by hurricanes and levee breaks.¹⁵ More than 51,000 of these units were located in New Orleans.¹⁶ The devastation visited on the rental housing market was particularly severe for those renting the nearly 18,000 subsidized rental units located in New Orleans.¹⁷ Even before the 2005 hurricane season, New Orleans experienced a serious housing affordability problem,¹⁸ which was exacerbated by last year’s storms. The affordable housing dilemma was more a function of low incomes than it was of high housing costs. “Prior to Katrina, housing expenditures for nearly half of renter households in the City exceeded 30% of income—the federal benchmark for determining if a renter’s housing expenditures are burdensome More than 85% of households making less than \$20,000 spent in excess of that level for housing.”¹⁹ Over two-thirds of the City’s rental housing, both affordable and market-rate, has been damaged in the past year, only worsening an already difficult situation.²⁰

Two state agencies, the Louisiana Recovery Authority (“LRA”) and the Louisiana Housing Finance Agency (“LHFA”), are presently working together to develop housing programs focused on revitalizing the affordable housing market in New Orleans.²¹ Toward this end, the LRA adopted the Road Home Workforce and

15. ACTION PLAN AMENDMENT, *supra* note 13, at 17; THE ROAD HOME RENTAL HOUSING PROGRAM, CONSEQUENCES FOR NEW ORLEANS 1 (2006), available at http://www.bgr.org/Consequences_for_N.O._091506.pdf (last visited Mar. 7, 2007) [hereinafter CONSEQUENCES FOR NEW ORLEANS].

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16. CONSEQUENCES FOR NEW ORLEANS, *supra* note 15, at 1.

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17. *Id.*; see also Gyan, *supra* note 13 (stating that seventy percent of Louisiana’s “hurricane-related rental housing destruction” occurred in New Orleans); Sheila Crowley, *Presentation to Gulf Coast Recovery and Rebuilding Caucus, U.S. House of Reps.* (Mar. 7, 2006), available at http://www.nlihc.org/detail/article.cfm?article_id=3415&id=72 (discussing, on behalf of the National Low Income Housing Coalition, the shortage of affordable housing in the broader context of the Gulf Coast region and estimating, conservatively, a loss of more than 214,400 affordable housing units in the region last year from hurricanes and flooding). Dr. Crowley also noted that, as of the time of her briefing before the House of Representatives, there were in excess of 20,000 vacant rental units needing repair in New Orleans that were privately owned and that this housing could be used to provide housing to distressed people by making money for rehabilitation available to owners. Crowley, *supra*.

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18. See CONSEQUENCES FOR NEW ORLEANS, *supra* note 15, at 2.

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19. *Id.*

20. *Id.*; see also Crowley, *supra* note 17.

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21. See CONSEQUENCES FOR NEW ORLEANS, *supra* note 15, at 2; see also The Road Home Program Homepage, <http://www.road2la.org/> (last visited Mar. 7, 2007).

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Affordable Rental Housing Program (“Road Home Program”). The Road Home Program is the largest housing recovery program in the United States.²² It assists homeowners and owners of rental property through various compensation and loan programs. The Small Rental Property Program is a component of the overall Road Home Program and is most relevant for this Article’s purposes.²³ The Small Rental Property Program’s main objective is to assist in rebuilding properties containing between one and four rental units and to encourage regional development of rental properties, particularly focusing on small rental properties and those with affordable rents.²⁴

The LHFA is a state entity and administers housing tax credits.²⁵ The LRA and the LHFA have committed to working together toward the goal of developing mixed income housing and “ensur[ing] the restoration of rental housing in the most heavily impacted parishes” of New Orleans.²⁶ These entities hope to motivate the private sector, with the lure of financial incentives from the LIHTC program and other programs, to build affordable housing and create “new mixed-income communities that accommodate families from across the income spectrum.”²⁷

Though the aims of the LRA are laudable, its program has come under significant criticism by a nonprofit, independent research organization, the Bureau of Governmental Research Housing Committee (“BGR”).²⁸ Initially, the LRA proposed a mixed income housing plan to “use the powerful incentives of the low income housing tax credit program and [Community Development Block Grant (“CDBG”)] funding to motivate developers to build new

22. See The Road Home Program Homepage, *supra* note 21. Funding for the Road Home Program comes from Stafford Act Hazard Mitigation Grant Program funds and Community Development Block Grant Program funds. ACTION PLAN AMENDMENT, *supra* note 13, at 3.

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23. The Road Home Program, *The Road Home Small Rental Property Program*, <http://www.road2la.org/srap.htm> (last visited Mar. 7, 2007).

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24. See *id.*; see also WALLACE ROBERTS & TODD, LLC, ACTION PLAN FOR NEW ORLEANS: THE NEW AMERICAN CITY (2006), available at <http://www.asla.org/land/nocityplan.pdf> (prepared for Bring New Orleans Back Commission, Urban Planning Committee) (presenting a “Rebuilding Neighborhoods Plan” to spur city-wide redevelopment).

25. CONSEQUENCES FOR NEW ORLEANS, *supra* note 15, at 1.

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26. ACTION PLAN AMENDMENT, *supra* note 13, at 19.

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27. *Id.*

28. *Id.* But see Gyan, *supra* note 13 (contesting the accuracy of the BGR’s findings but stating that the objectives of the BGR are the same as those of the LRA—“a deconcentration of poverty”).

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mixed income communities”²⁹ But this initial proposal elicited very little interest from private developers. The LRA and the LHFA responded by revising the initial program proposal.

Most notably, the [revisions] . . . reduce the emphasis on classic mixed income development, which combines low income, subsidized housing and market rate housing, reserving only 18% of the tax credits for such development. The remainder would be available for the development of very low income units in 100% low income housing tax credit developments.³⁰

In its September 2006 report, the BGR issued a statement that the current LRA programs threaten to exacerbate existing housing problems in New Orleans and even create new ones.³¹ Specifically, the BGR found that the LRA’s programs would result in concentrated poverty and the construction of housing stocks consisting entirely of low-income housing tax credit units.³² From a regional perspective, the plan would continue to disproportionately concentrate the area’s poor in Orleans Parish and would stymie the ability of the tax base to grow sufficiently to meet citizens’ needs.³³ Finally, the BGR was concerned that the LRA programs might leave large portions of New Orleans blighted.³⁴ New Orleans is speckled with small rental properties in need of repair and the LRA focuses on large-scale housing development, de-emphasizing smaller projects.³⁵

Before Hurricane Katrina, New Orleans contained a disproportionate number of the region’s subsidized, low income, and rental housing.³⁶ The hurricane has given city planners and engineers an

29. CONSEQUENCES FOR NEW ORLEANS, *supra* note 15, at 1.

30. *Id.*; see Gyan, *supra* note 13.

31. See CONSEQUENCES FOR NEW ORLEANS, *supra* note 15, at 2; Gyan, *supra* note 13.

32. CONSEQUENCES FOR NEW ORLEANS, *supra* note 15, at 2.

33. *See id.*

34. *See id.*

35. *See id.*; Gyan, *supra* note 13 (“The BGR report said 80 percent of New Orleans’ rental housing stock with major or severe damage—40,700 units—consisted of small rental properties. But BGR President and Chief Executive Officer Janet Howard told the authority board . . . that the Road Home program provides funding to restore only 12,000 of those properties over a 10-year period.”); see also ACTION PLAN AMENDMENT, *supra* note 13, at 23 (“Before the disaster, a large portion of very low income working families resided in single-family homes, ‘doubles’ and small, multi-family buildings with ten or fewer units that were owned and operated by small-scale landlords.”).

36. See CONSEQUENCES FOR NEW ORLEANS, *supra* note 15, at 3.

Prior to Hurricane Katrina, New Orleans housed a disproportionate number of the region’s rental units, low income households, and subsidized units. While it was home to only 36% of all households in the region, New Orleans

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opportunity to allocate to the relevant regions a fair share of this housing market.³⁷ Comprehensive planning occurs not just on a local level but must take into account regional concerns and considerations. Circumscribing the relevant region for planning purposes can be challenging, and there is room within this dialogue for reasonable minds to disagree.³⁸ Parishes contiguous to the hardest hit areas of New Orleans are certainly appropriate for inclusion in a regional plan and must necessarily absorb some of the displaced residents of poor and low-lying areas of New Orleans as part of their contribution to the rebuilding process.³⁹ Parishes and the municipalities within parishes must cooperate and collaborate to both tackle the common problems revealed and left by the 2005 storms and to use available resources optimally.⁴⁰

contained 48% of the renter households in the area. It was home to 60% of the region's renter households with incomes below the poverty level, and to 70% of the region's 26,000 subsidized units. One out of five renter households in Orleans received some housing subsidy, a rate twice that found in the suburban parishes.

Id.

37. A STANDARD CITY PLANNING ENABLING ACT 7 (Dep't of Commerce, Advisory Comm. on City Planning and Zoning 1928) [hereinafter STANDARD CITY PLANNING ENABLING ACT]. This Act proposes model legislation pertaining to developing a city plan, organizing a city planning commission, promulgating and controlling subdivision growth and development, and directing regional growth planning. *Id.* at 44-52; see also LOUISIANA RECOVERY & REBUILDING CONFERENCE, STARTING POINT 8-15 (2005), available at http://lrrc.aia.org/SiteObjects/files/lrrc_startingpoint_crf.pdf [hereinafter STARTING POINT] (suggesting similar elements to create community partnership and to aid in city planning and development).

38. See, e.g., Margaret Jane Radin, *Time, Possession, and Alienation*, 64 WASH. U. L.Q. 739, 756-57 (1986) (discussing the constitutional regional boundaries in the planning context but with reference to servitudes).

[I]n order to decide whether a package of servitudes is welfare maximizing, we must consider whether we are trying to maximize only the welfare of those in the tract covered by the servitudes, or the welfare of the suburb in which the tract is located, or the welfare of the whole city or region, etc. In other words, in order to know whether a servitude package is optimal, one of the things we have to know is whether it creates significant externalities, and in order to know what are to count as externalities, we have to know the "jurisdiction" over which we are maximizing welfare To make matters worse, the optimal jurisdiction is likely to vary over time and there is no reason to suppose that it will be coextensive with political boundaries, still less with the extent of land owned by any given grantor-developer imposing servitudes.

Id.

39. See, e.g., *S. Burlington County N.A.A.C.P. v. Mount Laurel Twp.*, 456 A.2d 390 (N.J. 1983); *S. Burlington County N.A.A.C.P. v. Mount Laurel Twp.*, 336 A.2d 713 (N.J. 1975), *cert. denied*, 423 U.S. 808 (1975) .

40. See generally STARTING POINT, *supra* note 37. "Parishes and municipalities must put aside old divisions and eliminate barriers to regional planning and cooperation." *Id.* at 4.

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III. EMINENT DOMAIN AS PART OF A REBUILDING STRATEGY

Broadly understood, the police power allows state and federal governments to regulate private citizens' property and liberty.⁴¹ Zoning to prevent development in flood plains is an example of one of the oldest and most established uses of the police power to prevent public harm, essentially protecting the public from itself.

Floods were originally seen as natural disasters to be avoided by dams and levees [P]ioneering work on flood control gradually convinced cities and the federal government that it would be more efficient to recognize that floods are positive natural processes and that humans should adapt to them by not putting costly permanent structures in flood plains.⁴²

Governments have long recognized that they are safely within their police power discretion to use zoning and even eminent domain to prevent loss of life and property among those who would be inclined to ignore the perils of developing and residing in flood plains. Furthermore, federal policy even requires flood plain zoning.⁴³ The above is a clear example of exercising police power to

41. *Lochner v. New York*, 198 U.S. 45, 53 (1905).

42. A. Dan Tarlock, *Local Government Protection of Biodiversity: What is Its Niche?*, 60 U. CHI. L. REV. 555, 576 (1993) (citations omitted).

43. *Id.* at 576-77.

Zoning ordinances that prevent construction in one hundred-year flood plains are some of the earliest examples of zoning to preserve open space and promote environmental objectives Flood plain zoning was initially puzzling to courts and commentators, because the fiscal benefits of land use controls were not well understood, and thus the protection of persons from their own folly seemed beyond the nuisance rationale. Flood plain zoning is now federal policy and has been uniformly endorsed by courts as a legitimate exercise of the police power. The standard justifications are the "protection of individuals who might develop or occupy . . . land despite apparent danger to life or property; protection of others from damage caused by the obstruction of the natural flood flow; and protection of the community as a whole from the public expenditures otherwise necessary to safeguard property located within a flood plain."

Id. (internal citations omitted); see generally David G. Tucker & Alfred O. Bragg, III, *Florida's Law of Storms: Emergency Management, Local Government, and the Police Power*, 30 STETSON L. REV. 837 (2001) (discussing the police power in the context of states of emergency). Specifically as it pertains to New Orleans, when it became clear that houses sustaining substantial damage (defined as houses requiring repairs that cost more than fifty percent of the cost to completely rebuild) would have to be built to one hundred year elevation standards in order to remain eligible for the federal government's flood insurance program, New Orleans authorities allowed many homeowners to appeal their assessed damage percentage seeking a downward revision to avoid having to elevate the homes they were rebuilding. When FEMA stated that all new and rebuilt houses should be raised an additional three feet above grade, New Orleans officials resisted strongly and have delayed passing a local ordinance implementing the FEMA requirement. FEMA and the Louisiana Recovery Authority,

accomplish general welfare goals. Regardless of one's personal or political views regarding how and to what extent New Orleans should be rebuilt, comprehensive planning will be necessary.⁴⁴ Eminent domain and zoning are crucial aspects of comprehensive planning.

“James Madison’s original intent in framing the Fifth Amendment’s Taking Clause⁴⁵ was to force government to be more efficient and to protect citizens from overly aggressive governmental intrusions upon their land.”⁴⁶ Madison’s and others’ high regard for physical rights to private property reflected prevailing notions that land, as the most treasured form of private property, was the gateway to individual autonomy and a necessary prerequisite for full societal participation.⁴⁷ A thoughtful and targeted use of eminent domain and of LIHTCs to relocate and disperse affordable rental housing among neighboring parishes in the New Orleans region can help stabilize the plight of the working- and middle-classes and dissuade predatory investor speculation⁴⁸ while simultaneously providing appropriate safeguards to cherished private property rights.

though, may require adherence to the above stated requirement as a condition for qualifying to receive Community Bloc Grants. See Brian Thevenot, *Finally, Rules for Rebuilding*, TIMES-PICAYUNE (New Orleans), Apr. 13, 2006, at 1.

44. Nicholas Lemann, *In the Ruins*, NEW YORKER, Sept. 12, 2005, available at http://www.newyorker.com/archive/2005/09/12/050912/ta_talk_lemann.

45. The Fifth Amendment, at one time, was held to apply exclusively to the federal government and not to the states. The United States Supreme Court, in *Chicago, Burlington & Quincy R.R. v. Chicago*, held that the just compensation requirement of the Fifth Amendment was an essential element of the Fourteenth Amendment’s due process guarantees and applied to the states. 166 U.S. 226, 238-39 (1897); see also Kenneth B. Bley, *Substantive Due Process and Land Use: The Alternative to a Takings Claim*, in TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS 289, 291 (David L. Callies ed., 1996) (stating that there is an instant relationship between the Takings and Due Process Clauses as the Fourteenth Amendment makes the Takings Clause of the Fifth Amendment applicable to the states).

46. Carol Necole Brown, *Taking the Takings Claim: A Policy and Economic Analysis of the Survival of Takings Claims After Property Transfers*, 36 CONN. L. REV. 7, 7 (2003); see generally William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995). Professor Treanor explained that James Madison, who proposed the Fifth Amendment’s Takings Clause, originally intended the clause to mandate compensation when the government took property physically, as opposed to by regulation. Treanor, *supra*, at 791.

47. Brown, *supra* note 46, at 7 n.3 (citing Treanor, *supra* note 46, at 821).

48. See, e.g., Ngai Pindell, *Fear and Loathing: Combating Speculation in Local Communities*, 39 U. MICH. J.L. REFORM 543, 546 (2006) (discussing the use of housing moratoria as “anti-speculation measures applicable to residential property”).

One writer noted the following trends in the aftermath of natural disasters:

[T]here are two seemingly opposing points of view about how to rebuild destroyed communities. On one hand, urban planners, real estate developers and architects tend to see solutions mainly in terms of demolition and large-scale redevelopment projects. On the other hand, property owners look at the wreckage . . . and ask, “How can I fix this?”⁴⁹

Some frame the initial and subsequent planning efforts in New Orleans in a similar type of bilateral context, the familiar “us against them” paradigm.⁵⁰ But the historical and virtually certain future environmental challenges facing New Orleans demand a more layered and integrated approach. Eminent domain can be useful when attempting to rebuild urban areas devastated by natural disaster. Citizens rely upon government to secure the public welfare when an area is altered by natural disaster. Local and state governments should employ responsible land use planning and development policies toward achieving the goal of redeveloping and reconstituting communities in pursuit of the public welfare. This redevelopment effort should account for housing the poor in a

49. Peter Werwath, *Two Paradigms for Renewal: Development Versus Property Owner Empowerment*, Soc. POL'Y (2005-2006), available at <http://www.socialpolicy.org/index.php?id=1640> (last visited Mar. 7, 2007).

50. See, e.g., *infra* note 85 (discussing the concerns voiced by a spokesman for a coalition of activists organizations that the destruction of New Orleans will be used as an opportunity to gentrify the City and permanently displace many of its minority and economically disadvantaged citizens); Gordon Russell & Frank Donze, *Let Residents Decide; Well-populated Areas Wouldn't Get Buyout*, TIMES-PICAYUNE (New Orleans), Dec. 19, 2005, at 1. The Urban Land Institute (“ULI”) recommended a plan for developing New Orleans that prompted opposition from some African-American leaders who were concerned that the plan might result in the disproportionate condemnation of minority neighborhoods. The ULI discouraged redevelopment “in various hard-hit neighborhoods—from eastern New Orleans and the Lower 9th Ward to parts of Gentilly and Lakeview—[which] brought a [cold reception] from political leaders in those areas.” Russell & Donze, *supra*; see also Gyan, *supra* note 13.

While [Louisiana Recovery Authority] members and authority Executive Director Andy Kopplin were discussing two “road Home” rental housing programs and an accompanying objective of not replicating what a Road Home handout called “pre-storm excessive concentrations of poverty,” New Orleanian Elizabeth Cook sprang to her feet and gave the board an earful.

Cook, who lives in the city’s Bywater area, yelled out from the audience at the Belle Chasse Auditorium. She said not repeating concentrations of poverty is a “code word” for keeping New Orleans’ displaced poor from returning to the city.

Russell & Donze, *supra*.

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manner that is consistent with the Federal Fair Housing Act⁵¹ and state fair housing laws.⁵²

For many homeowners, Hurricane Katrina performed a welcomed service by demolishing or severely damaging the rental housing stock and making New Orleans inaccessible for low-income tenants.⁵³ Renters' incomes are typically less than homeowners' making them more dependent on readily available affordable housing options.⁵⁴ The consequences to these citizens of New Orleans's depleted rental housing stock are worsened by the appreciating demand in the land and housing market in the City, mostly attributable to land investors and others who are speculating about the future of New Orleans.⁵⁵

The interest in buying, selling and renovating has been a bright spot since the last months of 2005, and has confounded some people who thought the flooding would cripple the housing market for years. But it is just one of many counterintuitive con-

51. 42 U.S.C. §§ 3601-31 (2000).

52. *See, e.g.*, Louisiana Equal Housing Opportunity Act, LA. REV. STAT. ANN. §§ 51:2601-14 (2006).

The legislature finds and declares that persons in this state who seek a place to live should be able to find such housing whenever it is available. *Further, in many localities there may be housing shortages.* All persons should therefore be able to compete for available housing on an open, fair, and equitable basis, regardless of race, color, religion, sex, handicap, familial status, or national origin.

It is therefore declared to be the policy of Louisiana that there is a legitimate governmental interest in protecting the welfare of the people of Louisiana by enacting equal housing opportunity legislation to discourage discriminatory housing practices.

It is the policy of the state of Louisiana to provide, within state and federal constitutional limitations, for fair and equal housing opportunity throughout the state.

Id. § 51:2602 (emphasis added).

53. *See* Susan Saulny & Gary Rivlin, *Renewal Money for New Orleans Bypasses Renters*, N.Y. TIMES, Sept. 17, 2006, at A14.

54. *Cf.* ENVISIONING A BETTER MISSISSIPPI, *supra* note 5, at 12-14 (discussing disparate levels of home ownership and rebuilding effort between lower-income minority areas and wealthier areas).

55. *See, e.g.*, Laura Maggi, *Housing Tax Credits Compromise Ok'd: Mixed-Income Plans to Get Future Money*, TIMES-PICAYUNE (New Orleans), Aug. 24, 2006, at 2 (discussing damage to New Orleans's rental housing market and the use of federal tax credits to address the problem); Gary Rivlin, *Après Le Déluge, Moi*, N.Y. TIMES, Mar. 5, 2006, § 6 (Magazine), at 68-76, 128, 199 [hereinafter Rivlin, *Après Le Déluge*]; Susan Saulny, *Investors Lead Home Sale Boom in New Orleans*, N.Y. TIMES, July 9, 2006, at A1.

trasts that are defining the area and making easy predictions unreliable.⁵⁶

Many apartments that were once eye-sores, negatively impacting neighboring property values, are now gone and neighbors of these buildings would like to see them replaced with open spaces (i.e., parks) and other niceties.⁵⁷ Presently, most of the housing policy efforts by federal, state, and local actors have focused on owner-occupied housing needs, leaving many concerned that rental housing and renters will not receive adequate consideration in the rebuilding process.⁵⁸ Changing the worst of New Orleans without destroying the opportunity for all interested citizens to return provides valuable opportunities for local governments to engage in responsible planning that adequately addresses the affordable rental housing crisis in New Orleans.⁵⁹

The Urban Land Institute has recommended that New Orleans delay redeveloping many of the most severely impacted areas of the City.⁶⁰ Some African-American leaders object to the Institute’s recommendation and are concerned that the minority neighborhoods could be negatively impacted in a disproportionate manner by condemnation and, relatedly, eminent domain.⁶¹ If residents are discouraged by these prospects of long-term displacement, they may be more inclined to sell land to speculators at

56. Saulny, *supra* note 55, at A1. “The higher prices are largely due to an increase in value in suburban areas, many of which were not heavily flooded, or in dry areas of New Orleans. But flooded houses in the city are being bought as well, often at deep discounts of as much as \$50 a square foot less than they would have sold for before the hurricane.” *Id.*

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57. See Saulny & Rivlin, *supra* note 53, at A14.

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58. See Crowley, *supra* note 17 (expressing concern for the devastation to New Orleans’s rental housing stock).

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59. See Saulny & Rivlin, *supra* note 53, at A14 (stating that nearly one-half of New Orleans’s residents were renters prior to Hurricane Katrina); Crowley, *supra* note 17 (discussing the devastation to New Orleans’s rental housing stock). *But see Fresh Air: At Odds Over Bush’s Approach to Katrina Costs* (WHYY radio broadcast Oct. 6, 2005) (discussing the President’s economic policy with Paul Krugman and Stuart Butler). Mr. Butler suggests that community-wide action, rather than a strong government hand, is the best source of leadership for rebuilding New Orleans and designing a new built environment. *Id.*

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60. See Martha Carr, *Experts Include Science in Rebuilding Equation: Politics Noticeably Absent from Plan*, *TIMES-PICAYUNE* (New Orleans), Nov. 25, 2005, at 1. A panel of more than fifty members of the Urban Land Institute, all land use experts, “emphasized that all property owners in areas that will not be immediately rebuilt should be bought out at pre-Katrina market values.” *Id.*; see Russell & Donze, *supra* note 50 (discussing Urban Land Institute recommendations for rebuilding New Orleans); see also *supra* notes 18-20 and accompanying text (discussing all of the factors that are working together to price poor renters out of New Orleans).

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61. See Russell & Donze, *supra* note 50.

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suppressed prices⁶² and, in so doing, miss out on the actual condemnation of their property. They may also miss out, however, on realizing the pre-Katrina market value of their property as opposed to the post-Katrina prices that developers and land speculators are paying.⁶³

Fairness and justice should be at the forefront of the eminent domain debate, especially when vulnerable cities and their citizens are struggling to recover from catastrophes. The interests of individual private property owners and of communities in their entirety must be balanced. The world is an evolving place, and governments need the authority to adjust economic burdens within the boundaries of fairness for all of their citizens. No longer do citizens merely seek abundant roads, an ample supply of fire stations, and safe schools.⁶⁴ Citizens are increasingly demanding more from

62. See, e.g., Gordon Russell, *6 Months Later, Recovery Gaining Focus; City May be Near Turning Point*, TIMES-PICAYUNE (New Orleans), Feb. 26, 2006, at 1.

Dave Silverman, a Xavier University communications professor who lost his job in the wake of Katrina and has moved to Colorado, is looking to get rid of his Gentilly home.

...

Silverman figures he would get about \$42,000 for a house that was worth \$250,000 before Katrina.

And that would be fine with him.

Id.; see also Saulny & Rivlin, *supra* note 53 (discussing the difficulties public housing occupants and other poor people are experiencing in returning to New Orleans, in part due to a lack of affordable housing and significantly increasing rental prices in the housing market); e.g., Rivlin, *Après Le Déluge, supra* note 55, at 74. Rivlin's article describes Patrick Quinn, a New Orleans native and businessman who saw Hurricane Katrina as an opportunity to acquire vast amounts of real estate, both commercial and residential. Rivlin, *Après Le Déluge, supra* note 55, at 68-70. Within two weeks after the hurricane, Mr. Quinn rented a luxury bus, his new office on wheels, and along with a driver, his assistant, and other employees, began driving around New Orleans making offers on properties of interest. *Id.* at 70-71.

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Patrick Quinn acknowledged that there's a fine line between an entrepreneur and a vulture. Borrowing a term coined during Reconstruction, he allowed that there was a question of whether he was a hero or a "scallawag"—a son of the South exploiting a chaotic and defeated region. Was he working to revitalize his city, or was he taking advantage of its vulnerability?

Id. at 74.

63. See Shaheen Pasha, *Property Grabs and the Gulf: Local Governments Will Likely Use Eminent Domain to Rebuild; Who Will That Help?*, CNN/MONEY, Oct. 5, 2005, http://money.cnn.com/2005/10/05/news/economy/eminent_domain_katrina/index.htm. Bart Peterson, the mayor of Indianapolis and an officer of the National League of Cities, opined that eminent domain would have an important role in rebuilding New Orleans and "added that a homeowner would be better off taking a government buyout at market value than falling into the hands of land exploiters looking to buy land cheap and sell high." *Id.*

64. See Jessica LeVeon Farr, *Eminent Domain and Economic Development: Striking a Balance*, PARTNERS IN COMMUNITY & ECONOMIC DEVELOPMENT (2006), *availa-*

government and as government strains to meet these needs, it must do so in light of important justice concerns that attend the redistribution of property.

Recently, private property owners unsuccessfully opposed joint urban development projects between government and private developers—“economic development takings”⁶⁵—at least at the federal level. “According to the National League of Cities, land acquired through eminent domain for economic development is usually designated for one of four purposes: to cure blighted conditions; to clear title of vacant property; to resolve compensation disputes; or as part of an overall redevelopment plan for an area.”⁶⁶ These projects often involve the use of eminent domain and the transfer of private property to private developers in the pursuit of plans that serve public uses.⁶⁷ Following the United States Supreme Court’s 2005 decision in *Kelo v. City of New London*,⁶⁸ the Louisiana legislature and its electorate amended the Louisiana State Constitution in a manner that arguably curtails, to a significant extent, the ability of government to acquire property through eminent domain and engage in public-private economic development projects using the acquired property.⁶⁹ Article I, Section 4 of the Louisiana Constitution states that, subject to certain exceptions,⁷⁰ “property shall not be taken or damaged by the state or its

ble at <http://www.frbatlanta.org/invoke.cfm?objectid=CECC668EA-5056-9F1A-E230246B4D66FEB1&method=display> (last visited Mar. 7, 2007) (published by the Federal Reserve Bank of Atlanta). “Eminent domain has most frequently been used by local governments to acquire land for such purposes as new roads, infrastructure improvements, civic buildings or schools.” *Id.*

65. *Kelo v. City of New London*, 545 U.S. 469 (2005).

66. Farr, *supra* note 64.

67. See, e.g., Ryan Chittum, *Eminent Domain: Is It Only Hope for Inner Cities?*, WALL ST. J., Oct. 5, 2005, at B1 (quoting one private property owner in East St. Louis as stating that “[e]minent domain is a horrible law I feel that it’s a little bit worse than communism”), see also *Kelo*, 545 U.S. 469; *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616 (1981) (per curium), *overruled by* *County of Wayne v. Hathcock*, 471 Mich. 445 (2004). The court in *Poletown* held that the condemnation of private property and its transfer to General Motors Corp. for construction of an assembly plant was not a taking of private property for private use but rather for a public purpose. *Poletown*, 410 Mich. at 628-29. More than twenty years later, the court overruled its decision in *Poletown*: “Because *Poletown*’s conception of a public use—that of ‘alleviating unemployment and revitalizing the economic base of the community’—has no support in the Court’s eminent domain jurisprudence before the Constitution’s ratification, its interpretation of ‘public use’ . . . cannot reflect the common understanding of that phrase” *County of Wayne*, 471 Mich. at 482-83.

68. 545 U.S. 469 (2005).

69. LA. CONST. art. I, § 4.

70. *Id.* Article I, Section 4(B)(1) excepts from this provision expropriations authorized by Louisiana Constitution Article VI, § 21 that permits expropriation of cer-

political subdivisions: (a) for predominant use by any *private person or entity*; or (b) for *transfer of ownership to any private person or entity*.⁷¹ The provision further states that “[p]roperty 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”⁷² The impact of this constitutional amendment on New Orleans’s recovery and on this Article’s proposals is ambiguous. What is certain is that “[p]ublic-private partnerships will be critical to augment the city’s resources for rebuilding.”⁷³

Eminent domain is sometimes employed to address needs arising from catastrophes and, in these instances, a broad and permissive understanding of eminent domain helps government. Particularly when strategizing to rebuild urban areas that have been devastated by disasters, such as New Orleans, traditional police power jurisprudence permits takings decisions to be made based upon long-established police power principles and obviates the need to rely on nuanced or vague cases of constitutional interpretation.⁷⁴ Citizens rely upon government to secure the public welfare when an area is altered by natural disaster. Local and state governments should employ responsible land use planning and development policies following disaster situations. The goal is to redevelop and reconstitute communities so as to best provide for the public welfare and to avoid spot redevelopment, the epitome of poor planning. Instances of catastrophe and disaster reflect the most traditional uses of eminent domain—that of slum clearance and urban renewal—and are different from pure economic development takings.

“An intelligent city plan thinks impartially for all parts of the city at the same time, and does not forget the greater needs of tomorrow in the press of today.”⁷⁵ Exercise of the police power and the related power of eminent domain may be necessary if government is to function properly and serve the public’s best interest. It

tain industrial sites in order to encourage the location of additional industrial business to the State. *Id.* art. VI, § 21(A)(b).

71. *Id.* art. I, § 4(B) (emphasis added).

72. *Id.* art. I, § 4(B)(4) (emphasis added).

73. Farr, *supra* note 64.

74. See generally Thomas W. Merrill, *Six Myths About Kelo*, PROP. & PROB., Jan.-Feb. 2006, at 19.

75. Richard M. Rosan, *Rebuilding New Orleans and the Gulf Coast—A Long Look Ahead*, URBAN LAND INSTITUTE, <http://www.uli.org/AM/Template.cfm?Section=Home&CONTENTID=37417&TEMPLATE=/CM/ContentDisplay.cfm> (last visited Mar. 7, 2007) (internal quotation marks omitted).

is well established that government may regulate by exercise of its police power for purposes of maintaining public health, safety, morals, and general welfare.⁷⁶ With New Orleans's history of natural disaster and the likelihood of recurrence, smart planning and land use are especially necessary. Katrina laid bare the disparities that have affected many poor residents for decades.⁷⁷ This history is partly responsible for the fear of some that residents of the estimated 150,000 flooded homes,⁷⁸ many located in predominantly poor, minority, low-lying areas will be forced out and their neighborhoods gentrified. This fear was legitimized when investors and prospectors quickly began contacting local real estate agents trying to purchase habitable and flooded homes while residents and evacuees were still reeling from the devastation of Hurricane Katrina.⁷⁹

There are short term and long term costs of rebuilding New Orleans. These costs may justify the condemnation of significant amounts of private property that are especially prone to flood hazards, either because of their location or because of their population density. The police power in American constitutional law has been a source of ambiguity and of some confusion;⁸⁰ even with its

76. See *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915) (stating that the police power is one of government's most essential powers and one least susceptible to limitation); *STANDARD CITY PLANNING ENABLING ACT*, *supra* note 37, at 7 n.8 (empowering municipalities to implement a municipal plan and acknowledging that city governments should seek to promote "the public health, convenience, safety, and welfare . . ."); U.S. DEP'T OF COMMERCE, *ADVISORY COMMITTEE ON ZONING: A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS* 4 n.3 (rev. ed. 1926) (stating that "[t]he main pillars on which the police power rests are these four, viz, health, safety, morals, and general welfare. It is wise, therefore, to limit the purposes of this enactment to these four").

77. See, e.g., Press Release, Amer. Chem. Soc'y, Post-Katrina: Lead in Disturbed Soil May Pose Heightened Health Risk (Dec. 14, 2005), available at <http://www.texastech.edu/neworleanspollution/pressRelease2.php>; Martha Carr, *National Experts Focus on N.O.; Los Angeles Gathering Takes Holistic Approach*, *TIMES-PICAYUNE* (New Orleans), Nov. 4, 2005, at 1.

While most city residents remain focused on when they can return to their homes and rebuild on their property, [Urban Land Institute] members said residents need to begin thinking about where that property might fit into the city's long-term redevelopment. Many warned it will take at least 10 years for the city to build enough housing to restore the city's original population. Carr, *supra*; see also Pasha, *supra* note 63; David Streitfeld, *Speculators Rushing in as the Water Recedes*, *L.A. TIMES*, Sept. 15, 2005, at A1; Liza Featherstone, *The Other Side of the Big Easy*, *GRIST MAG.*, Sept. 12, 2005, <http://www.alternet.org/story/25278> (stating that many of the toxins that now pollute New Orleans's streets are the product of environmental injustice and may make many parts of the city uninhabitable for years).

78. See Streitfeld, *supra* note 77, at A2.

79. See Rivlin, *Après Le Déluge*, *supra* note 55, at 68-76, 128, 199.

80. See, e.g., Brown, *supra* note 46, at 7 (providing a history of eminent domain).

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“shadowy” history though, the police power provides virtually unequivocal authority for governments to exercise their takings power in cases of widespread devastation such as this.

IV. THE LOW INCOME HOUSING TAX CREDIT PROGRAM

In light of the United States Supreme Court’s decision in *Kelo v. City of New London*,⁸¹ in which the Court adopted a broad definition of public use and upheld the constitutionality of economic development takings, some fear that eminent domain will be used in favor of extensive commercial redevelopment of New Orleans.⁸² Others fear that property will be condemned to create flood plains, displacing residents who wish to return and rebuild,⁸³ and that residents will be “left to negotiate their own deal with private interest, unaided by legislative protections against market forces.”⁸⁴ Even if the eminent domain power is used to rebuild residential communities, there is concern that the housing developed will only be affordable to a certain segment of the population, leaving the poor and working class with no place to which to return.⁸⁵ Developers and investors will require incentives to participate in the redevelopment of affordable rental housing in New Orleans.⁸⁶ The

81. 545 U.S. 469 (2005).

82. See Emily Chamlee & Daniel Rothschild, *Government Dines on Katrina Leftovers*, WALL ST. J., June 15, 2006, at A15.

83. Robert Aalberts, *From the Editor-In-Chief—Hurricane Katrina: Will New Orleans Real Estate Emerge from the Devastation?*, 34 REAL EST. L.J. i (2005). Aalberts states that this action would be “politically explosive involving issues of rich versus poor, as well as accusations of racism.” *Id.*

84. Wendy B. Scott, *From an Act of God to the Failure of Man: Hurricane Katrina and the Economic Recovery of New Orleans*, 51 VILL. L. REV. 581, 587 (2006). Professor Scott, of Tulane Law School, was evacuated to Houston and eventually ended up in Carrollton, Georgia. *Id.* at 583 n.5.

85. A spokesperson for the Community Labor United, a coalition of activist organizations, stated:

The people of New Orleans will not go quietly into the night, scattering across this country to become homeless in countless other cities while federal relief funds are funneled into rebuilding casinos, hotels, chemical plants and the wealthy white districts of New Orleans like the French Quarter and the Garden District. We will not stand idly by while this disaster is used as an opportunity to replace our homes with newly built mansions and condos in a gentrified New Orleans.

Andrew Pollack, *Socialist Action Article*, THE PEOPLE’S HURRICANE RELIEF FUND & OVERSIGHT COALITION, http://cluonline.live.radicaldesigns.org/?page_id=58 (last visited Mar. 28, 2006).

86. Marc Schnitzer, a member of the Affordable Housing Tax Credit Coalition, states that the uncertain market will make it difficult to finance housing in the area impacted by Hurricane Katrina. “If you were just looking to the private sector, you are going to have people building luxury condos on the Gulf Coast where they will

uncertainty of the City's economic and population base provides an unpredictable market in which to invest and develop projects that do not provide for a high rate of return. Low income housing tax credits, used in conjunction with land acquired by eminent domain, can provide the added incentive to developers and investors to build much-needed rental housing affordable to returning residents, including residents who are part of the workforce essential to the recovering City's economic base. Equitable redevelopment of New Orleans, however, also requires careful consideration of the location of these LIHTC projects. To that end, the state agency responsible for the program should use an allocation approach that disperses projects throughout the region in mixed-income neighborhoods, leading to a decrease in the racial and economic isolation characteristic of pre-Katrina New Orleans.

A. How the Program Works

The Low Income Housing Tax Credit program was created as a tax incentive to increase the construction and rehabilitation of affordable rental housing units.⁸⁷ Unlike many of the nation's housing programs, the LIHTC is administered by the Department of Treasury and the Internal Revenue Service ("IRS") with the Department of Housing and Urban Development ("HUD") having oversight of specific portions.⁸⁸ The program provides an income tax credit to developers of qualified housing projects who usually sell the credits to investors for equity in the property. The tax credit lowers the financing costs of the project to the developer, allowing the developer to build a project with units that offer lower rents to qualified tenants.⁸⁹

1. Allocation of Credits

The IRS allocates housing tax credits to states through state housing finance agencies.⁹⁰ Each state is awarded credits based on

make money. They will not be building affordable housing without the benefit of the tax credits." Michael Corkery, *Housing Tax Credit May Be New Orleans's Answer*, WALL ST. J. ONLINE, Oct. 17, 2005, <http://www.realestatejournal.com/regionalnews/20051017-corkery.html> (quoting Marc Schnitzer).

87. The credits were included in the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986).

88. The Secretary of Housing and Urban Development designates the Difficult Development Areas. 26 U.S.C. § 42(d)(5)(C)(iii) (2004). HUD also reviews the Qualified Allocation Plans submitted by each local or state agency charged with administering the program. *Id.* § 42(l)(3).

89. The credit is claimed over a ten-year period. *Id.* § 42(b)(2)(B).

90. *Id.* § 42(h)(3)(B).

its populations.⁹¹ Credits not awarded are placed in a national pool and then distributed to states that apply for the excess credits.⁹²

Once the state reaches its credit ceiling, its housing finance agency awards tax credits to a project based on a Qualified Allocation Plan (“QAP”). In the plan, the state agency sets forth the criteria by which it will judge projects competing for the credits.⁹³ Thus, through the QAP, “state policy makers are making critical choices about rental housing policy that affect the well-being of individual households and the economic health of the state’s metropolitan areas.”⁹⁴

The QAP is reviewed by HUD as part of a state consolidated plan for Section 8 and public housing programs. By law, the QAP must give priority to projects that will accomplish three objectives: (1) to serve the lowest-income families; (2) to be structured to remain affordable for the longest period of time; and (3) to contribute to a community revitalization plan.⁹⁵ Both for-profit organizations and nonprofit organizations can compete for the tax credits to develop these projects. Federal law requires that at least ten percent of a state’s housing credits be allocated to projects in which a nonprofit organization owns an interest in the project and materially participates in the operation and development.⁹⁶ It is important to note that land acquisition costs are not included in the eligible basis for determination of the credit.⁹⁷

Developers of LIHTC projects can and do sell tax credits to investors to provide equity to fund the development. The investor then receives the tax credit against its federal tax liability, generating a return on its investment.⁹⁸ The vast majority of investors in

91. *Id.* § 42(h)(3)(C).

92. *Id.* § 42(h)(3)(D).

93. *Id.* § 42(m)(1)(B)(i).

94. JILL KHADDURI & DAVID RODDA, MAKING THE BEST USE OF YOUR LIHTC DOLLARS: A PLANNING PAPER FOR STATE POLICY MAKERS 3 (2004), available at [http://www.novoco.com/low_income_housing/resource_files/research_center/LIHTC Dollars.pdf](http://www.novoco.com/low_income_housing/resource_files/research_center/LIHTC_Dollars.pdf) (last visited Mar. 7, 2007) (report prepared for the Department of Housing and Urban Development, Office of Policy Development and Research).

95. 26 U.S.C. § 42(m)(1)(B)(ii).

96. *Id.* § 42(h)(5)(A). Some argue that nonprofit entities develop projects that set lower rents than for-profit entities. See Megan J. Ballard, *Profiting from Poverty: The Competition Between For-Profit and Nonprofit Developers for Low-Income Housing Tax Credits*, 55 HASTINGS L.J. 211, 239 (2003). Ballard asserts that nonprofit developers offer more social services to tenants and tend to meet the housing needs of larger families better. *Id.*

97. 26 U.S.C. § 42(e)(2)(b).

98. See PAMELA J. JACKSON, CONGRESSIONAL RESEARCH SERVICE, AN INTRODUCTION TO THE DESIGN OF LOW-INCOME HOUSING TAX CREDIT 4 (2006), available

LIHTC projects are corporate investors.⁹⁹ Financial institutions subject to the Community Reinvestment Act (“CRA”) make up approximately forty-three percent of investors.¹⁰⁰ The investment is attractive to financial institutions regulated under the CRA since an investment in LIHTC can meet the investment test of the CRA.¹⁰¹

2. *Qualified Projects and Eligible Tenants*

A developer can qualify a project for the LIHTC through one of two tests. Under the “20-50 test,” a qualified low-income housing project must have twenty percent or more of the residential units in the project occupied by individuals whose income is fifty percent or less of the area’s median gross income.¹⁰² Alternatively, a developer may elect to qualify a project by having at least forty percent of the units occupied by individuals with income of sixty percent or less of the area’s median gross income (the “40-60 test”).¹⁰³ Once the election is made, the developer cannot change the test.¹⁰⁴ Furthermore, a developer must commit the building to affordability for fifteen years to be eligible for the credit.¹⁰⁵ Failure to maintain the required minimum number of low-income units could result in the loss of tax credits and its recapture by the IRS.¹⁰⁶

The project must also meet a gross rent restriction with respect to each unit such that the gross rent of a unit does not exceed thirty percent of the income limitation applicable to the unit. Gross rent does not include any Section 8 payments or other comparable rental assistance.¹⁰⁷ The residential units must be available for use by the general public; however, developers are allowed preferences

at http://digital.library.unt.edu/govdocs/crs//data/2006/upl-meta-crs-9134/RS22389_2006Feb24.pdf.

99. *Id.*

100. *Id.* at 5. The LIHTC has been called an “excellent investment” for banks. See Catherine Such, *Low Income Housing Tax Credits*, COMMUNITY INVESTMENTS (Fed. Reserve Bank of San Francisco, San Francisco, CA), Mar. 2002, at 5, available at <http://www.frbsf.org/publications/community/investments/cra02-2/lowincome.pdf>.

101. The “investment test” evaluates a bank’s record of fulfilling the credit needs of the community in which it is located. One of the criteria of the test is responsiveness to investment to community development needs. See 12 C.F.R. § 25.23(e)(3) (2006).

102. 26 U.S.C. § 42(g)(1)(A).

103. *Id.* § 42(g)(1)(B).

104. *Id.*

105. *Id.* § 42(h)(6)(D).

106. *Id.* § 42(j).

107. *Id.* § 42(g)(2)(A).

for classes of tenants so long as no HUD nondiscrimination policies are violated.¹⁰⁸

B. Segregation, Poverty, and the LIHTC

One question about the LIHTC recurs: Do the credits concentrate low-income families in segregated neighborhoods with high rates of poverty?¹⁰⁹ States, through their QAPs, could implement policies that create mixed-income, racially integrated communities with LIHTC projects, but the evidence suggests that they are doing otherwise.¹¹⁰ A variety of factors converge to lead to racial segregation and poverty concentration, including persistent racial discrimination in housing and statutory incentives to develop in certain tracts.¹¹¹ Priorities under the QAPs and the statutory incentives must be reordered for the LIHTC credits to be useful in the racially-charged, class-conscious redevelopment of New Orleans.

1. Evidence of Racial Segregation and Poverty Concentration

Several studies support the conclusion that current policies regulating the LIHTC program promote racial segregation and concentrate poverty in neighborhoods in which LIHTC projects are located. One study using data from the 2000 census and from HUD on the location of federally-assisted project-based units found that LIHTC neighborhoods contain disproportionately more Blacks.¹¹² Blacks make up fifteen percent of metropolitan residents, but account for twenty-six percent of residents in LIHTC neighborhoods.¹¹³ According to the authors of this study, the pattern of racial segregation is even more pronounced in the South and Midwest.¹¹⁴ Another study found that only a few states place more than half of their LIHTC projects in census tracts with minor-

108. I.R.S. Notice 89-6, 1989-1 C.B. 625.

109. Lance Freeman, *Siting Affordable Housing: Location and Neighborhood Trends of Low Income Housing Tax Credit Developments in the 1990s*, BROOKINGS INST., Mar. 2004, at 1, 7, available at http://www.brookings.edu/urban/pubs/20040405_Freeman.pdf (last visited Mar. 7, 2007); see also, e.g., KHADDURI ET AL., *supra* note 11.

110. See Freeman, *supra* note 109, at 1 (finding that LIHTC neighborhoods contain disproportionate shares of black residents).

111. E.g., 26 U.S.C. § 42(d)(5)(C) (detailing increased credit for building in Difficult Development Areas).

112. See Freeman, *supra* note 109, at 7.

113. *Id.* Freeman concludes that programs such as the LIHTC do little to alleviate the isolation of blacks in segregated neighborhoods. *Id.*

114. *Id.*

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ity population rates less than half the rate for the metropolitan areas.¹¹⁵ It also found that almost ninety percent of the LIHTC units located in census tracts with a ten percent or less poverty rate were also in census tracts with more than half of the population identified as non-Hispanic white.¹¹⁶ The authors of this study concluded that “[p]roviding less racially isolated housing opportunities, per se, does not appear to be a priority for states as they administer the LIHTC program.”¹¹⁷

Both of the studies cited above report on the racial composition of neighborhoods in which LIHTC projects are located. Neither reports on the actual racial or ethnic composition of individual LIHTC projects as data on the characteristics of individual households is not systematically collected and monitored.¹¹⁸ Thus, the opportunity for people of color and low-income families to live in LIHTC projects in low-poverty, racially desegregated areas may in fact be unknown.¹¹⁹

2. *A Fair Housing Act Challenge to a QAP*

A QAP was challenged for funding LIHTC projects in a manner which perpetuated racial discrimination in a 2004 New Jersey case, *In re Adoption of 2003 Low Income Housing Tax Credit Qualified Allocation Plan*.¹²⁰ Four public interest organizations sought review of a New Jersey QAP that they argued encouraged racial segregation in violation of the federal Fair Housing Act¹²¹ by funding affordable housing in areas with high minority populations.¹²² The organizations also contended that the QAP violated the section of the New Jersey Constitution which prohibited segregation in public schools.¹²³ They further alleged that the Housing Mortgage Finance Agency’s (“HMFA”) allocation of tax credits would result in nearly seventy-five percent of the projects being built in segregated neighborhoods.¹²⁴

115. KHADDURI ET AL., *supra* note 11, at 22.

116. *Id.* at 10.

117. *Id.* at 22.

118. *Id.* at 2, 22.

119. *Id.* at 23.

120. 848 A.2d 1 (N.J. Super. Ct. App. Div. 2004), *cert. denied*, 861 A.2d 846 (N.J. 2004).

121. 42 U.S.C. §§ 3601-09.

122. *In re Adoption*, 848 A.2d at 5. The organizations also contended that the QAP violated the state’s *Mount Laurel* doctrine. *Id.* at 5-6.

123. *Id.* at 6.

124. *Id.* at 9.

The HMFA, the state agency responsible for implementing the LIHTC program in New Jersey, countered that the QAP gave incentives to de-concentrate poverty, including adding preferences for mixed-income housing developments.¹²⁵ By contrast, in prior years, credit preferences were given to projects that were affordable to one hundred percent of its tenants.¹²⁶ The HMFA also responded that contrary to allegations that the 2003 QAP encouraged racial segregation, it instead encouraged community revitalization in urban neighborhoods by rewarding projects that demonstrated a comprehensive strategy for such revitalization.¹²⁷

The court first held that the HMFA was subject to the “affirmatively to further” requirement under the Fair Housing Act.¹²⁸ The requirement ensures that housing programs are administered in a manner affirmatively to further the goal of fair housing. That duty, however, must be defined “congruent” with the statutory powers of the HMFA.¹²⁹

The organizations opposing the QAP argued that the affirmative duty should be fulfilled by incorporating HUD regulations on site-selection procedures into the QAP.¹³⁰ These regulations required that proposed sites for public-housing projects could not be located in an area of minority concentration unless the project was necessary to meet overriding housing needs which could not otherwise feasibly be met in the area’s housing market.¹³¹ The court disagreed, noting that neither HUD nor the IRS had expressly mandated that the state finance agencies adopt the regulations for LIHTC projects.¹³² The HMFA was first and foremost a financing entity, not a siting agency charged with selecting the locations of the LIHTC projects.

The court found that the “overriding mission” of the HMFA was to encourage the construction of affordable housing.¹³³ Its duty to “affirmatively further” fair housing had to be read within the context of its housing agenda: “to end homelessness by addressing the needs of low- and moderate-income families through the fostering

125. *Id.* at 8.

126. *Id.*

127. *Id.* at 9.

128. *Id.* at 13.

129. *Id.* at 14.

130. The four public interest organizations challenging the validity of the QAP were the Fair Share Housing Center, the Camden County N.A.A.C.P., the Burlington County N.A.A.C.P, and the Camden County Taxpayers Association. *Id.* at 6.

131. *Id.* at 13-14 (citing 24 C.F.R. § 941.202 (2005)).

132. *Id.* at 14.

133. *Id.* at 15.

of new construction and rehabilitation of affordable-housing units.”¹³⁴ The fundamental mission of the HMFA could be compromised by focusing primarily on the racial composition of the project’s locale. The promotion of racial integration may be a “desirable by-product” of the HMFA’s duties, but is not its central mission.¹³⁵

The case highlights the tensions between federal housing policies that encourage the development of affordable housing and those that promote residential desegregation. It also highlights the tensions between various organizations advocating for federally subsidized housing programs. On one hand, fair housing advocates argue that the credits concentrate poverty and aid in re-segregation of communities, causing these communities to decline. Job and educational opportunities become rare, and living conditions are worsened. On the other hand, local leaders and community development organizations argue that the credits not only build housing for those who can least afford it, but they also revitalize neighborhoods which are in sore need of investment.¹³⁶ The LIHTC is “virtually the only capital available to neighborhoods that have been effectively redlined by the private market.”¹³⁷

3. *The “GO Zone” QAP*

The transformative nature of LIHTC projects has been incorporated into the priorities set for the QAP, which will regulate the allocation of credits in the areas impacted by Hurricanes Katrina and Rita. In response to those two natural disasters, the U.S. Congress authorized an increase in LIHTC credits allocated to Louisiana as part of the Gulf Opportunity Zone Act of 2005 (“GO Zone Act”).¹³⁸ The GO Zone QAP targets resources to developments that will achieve the State’s goals of providing workforce housing

134. *Id.*

135. *Id.*

136. Orfield describes the spectrum of positions: 1) the regionalists who claim that the LIHTC allocations concentrate poverty and segregate racial minorities; 2) the localist community development entities that support the tax credits as part of urban revitalization efforts; and 3) a middle ground position taken by entities that advocate civil rights, but “depend upon status quo programs.” Orfield, *supra* note 3, at 1784-89.

137. *Id.* at 1752-53.

138. Pub. L. No. 109-135, 119 Stat. 2577 (2005). An extra eighteen dollars in tax credits are allocated for each pre-hurricane resident in the Katrina disaster area for the funding of an estimated 28,000 housing units in Louisiana. WILL FISCHER & BARBARA SAND, HOUSING NEEDS OF MANY LOW-INCOME HURRICANE EVACUEES ARE NOT BEING ADEQUATELY ADDRESSED 12 n.13 (Center on Budget and Policy Priorities 2006), available at <http://www.cbpp.org/2-23-06hou.pdf>.

and providing replacement housing for extremely-low-income evacuees “without replicating the excessive concentration of poverty that was prevalent prior to Hurricane Katrina.”¹³⁹

The State’s policy objective for “workforce housing” was outlined in its “The Road Home Housing Programs Action Plan Amendment for Disaster Recovery Funds.”¹⁴⁰ The State defines workforce housing as housing “affordable to important workforce populations such as teachers, police, nurses, and firefighters.”¹⁴¹ To achieve the goal of de-concentrating poverty, mixed-income developments received preference in the QAP.¹⁴² Sponsors of such developments must demonstrate how the project will lead to neighborhood revitalization, de-concentration of poverty, and smart growth.¹⁴³ Factors that will be considered when considering programs include:

- 1) Affordability: Because it wishes to produce workforce housing, the state will look at the level of market rents relative to the area’s median income and whether the developer “proposes to accept a restriction on the rents charged for the units;”¹⁴⁴
- 2) Mixed-Income Plan: The state will review “the likelihood that [the developer] will successfully create a viable mixed-income community;”¹⁴⁵
- 3) Quality: The state will review the quality of the design, including the proposed unit sizes, and the features and amenities of the project;¹⁴⁶ and
- 4) Other Public Purpose: The state will consider “the extent of support for the project from the neighborhood and the local

139. LOUISIANA HOUSING FINANCE AGENCY, LOW-INCOME HOUSING TAX CREDIT PROGRAM RESERVATIONS OF GULF OPPORTUNITY AMOUNT CREDITS CALENDAR YEAR 2007 & 2008, at 3 (2007), available at <http://www.lhfa.state.la.us/downloads/lihtc/2007-QAP9-FinalDraft-15sept06.pdf> [hereinafter GO Zone QAP]. Extremely low income households are those in which the household income at initial occupancy is thirty percent or less of the area median income. *Id.* at 39.

140. See sources cited *supra* note 15.

141. GO Zone QAP, *supra* note 139, at 3.

142. *Id.*

143. *Id.* Smart growth includes considerations such as the proximity of the site to public transit and basic community resources. *Id.* at 41.

144. *Id.* at 3.

145. *Id.* To deconcentrate projects, the QAP awards more points to projects that have a lower percentage of low-income units in the project (e.g., twenty percent) than projects with a higher percentage (e.g., sixty percent). See *id.* at 63. It also awards points to projects located in census tracts in which the median income of the census tract exceeds the area median income. See *id.*

146. *Id.* at 4.

government” and “how the proposed project will facilitate the economic and social improvement of the neighborhood.”¹⁴⁷

Threshold requirements for processing a reservation of tax credits include evidence of essential infrastructure and proximity to other services.¹⁴⁸ The project sponsor must show evidence that reasonable transportation services are currently proximate to the site or, if not, how tenants will be able to access commercial, educational, recreational, and other services upon completion of the project.¹⁴⁹ Amenities are also considered. Washers and dryers in every unit will receive twenty-five points, while providing a dedicated room equipped with computers and high-speed internet access will reward a sponsor with fifteen points.¹⁵⁰

C. Priorities for LIHTC Projects

The success of the LIHTC program in building housing units contrasts sharply with the failure of the credits to desegregate communities and to de-concentrate poverty. This failure may be the result of a narrow view of the LIHTC program as simply one to fund housing structures.¹⁵¹ Through their QAPs, states should instead allocate LIHTC credits in a manner more sensitive to siting decisions and more responsive to the housing, land use, and economic needs of the region. A flexible approach would consider the credits part of a comprehensive plan to build housing units, to revitalize communities, and to provide services, such as emergency housing, to a diverse population.

1. *Mixed-Income Neighborhoods and Projects*

Tavis Smiley, an African-American social commentator, declares in his book *The Covenant with Black America* that “[f]ederal and state policy-makers can set criteria that require LIHTC developments be located in opportunity-rich, mixed-income neighbor-

147. *Id.*

148. *Id.* at 59.

149. For example, points are awarded for certain services located within a specified distance of the site: four points if a grocery store is located within one mile of the project, three points if a public library is within two miles of the project. Points can be deducted for negative neighborhood services: five points are deducted if the project is adjacent to, among other things, a junk yard, a wastewater treatment facility, a liquor store, or an adult entertainment theater. *Id.*

150. *Id.* at 60.

151. The New Jersey HMFA in *In re Adoption of 2003 Low Income Housing Tax Credit Qualified Allocation Plan* argued that it was a funding agency, rather than a siting agency. 848 A.2d 1, 13-14 (N.J. Sup. Ct. App. Div. 2004), *cert. denied*, 861 A.2d 846 (N.J. 2004).

hoods. Giving priority to tax credit housing in job-growth areas, near public transit and near high-achieving schools, would strengthen African-American residents' access to other opportunities."¹⁵² He is not alone in advocating for an approach to LIHTC allocations as part of a regional housing strategy that extends beyond the provision of affordable shelter for low-income families.¹⁵³ Officials responsible for the selection of LIHTC projects can consider the transformative nature of such projects to a community and its residents, targeting them to areas where market-rate housing is being constructed and where jobs, public transportation, and educational opportunities exist.

One such targeted area would include neighborhoods that are becoming "gentrified," i.e., those in which housing prices are increasing rapidly.¹⁵⁴ Providing developers an incentive to locate affordable housing in these communities will give lower-income families a chance to live in mixed-income neighborhoods close to transportation centers, to revitalized central business districts, and to better public services such as parks and schools, all which make the gentrified area desirable to higher-income residents. Even more so, the requirement that LIHTC units remain affordable for a certain period of time will ensure that the units will not become market-rate units, eventually pricing out of the neighborhood the very residents for whom the project was intended to benefit.

Enhanced tax credits are given for placing LIHTC developments in Qualified Census Tracts, that is, any census tract in which fifty

152. TAVIS SMILEY, *THE COVENANT WITH BLACK AMERICA* 112 (2006). The book sets out ten covenants for Black America, and then outlines what individuals and elected officials can do to accomplish each. The LIHTC is discussed in Covenant V, "Ensuring Broad Access to Affordable Neighborhoods." *Id.*

153. *See, e.g.*, KHADDURI & RODDA, *supra* note 94. The authors state, "The availability of affordable housing near jobs and around transportation nodes is important for helping individual low-income families enter the economic mainstream." *Id.* at 17 (citing BRUCE KATZ & MARGERIE AUSTIN TURNER, *RETHINKING AFFORDABLE HOUSING STRATEGIES: AN ACTION AGENDA FOR LOCAL AND REGIONAL LEADERS* (The Brookings Institution Center on Urban and Metropolitan Policy & The Urban Institute, Dec. 2003)).

154. *Id.* at 18. For opposing views on gentrification, compare J. Peter Byrne, *Two Cheers for Gentrification*, 46 *How. L.J.* 405 (2003), with John Powell & Marguerite Spencer, *Giving Them the Old "One-Two:" Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 *How. L.J.* 433 (2003). Byrne views gentrification as a process "by which people of higher income move into lower income urban areas and seek to change its physical and social fabric to better meet their needs and preferences." Byrne, *supra*, at 406. Powell and Spencer identify negative consequences of gentrification: displacement; changes in power structures, institutions, and voting power; and loss of local businesses and social services. Powell & Spencer, *supra*, at 435.

percent or more of the households have an income which is less than sixty percent of the area median gross income or which has a poverty rate of at least twenty-five percent.¹⁵⁵ Incentives are also given to place LIHTC developments in Difficult Development Areas, which are those with high construction, land, and utility costs relative to the area's median gross income.¹⁵⁶ While intended to encourage developers to build in more distressed and disadvantaged areas, a consequence of this preference has been to promote the building of many LIHTC developments in areas with above-average concentrations of poverty.¹⁵⁷ To counter this concentration of poverty when rebuilding New Orleans and in its vicinity, the QAP must give priority to developments that will be located in mixed-income neighborhoods located throughout the region.¹⁵⁸

Creation of mixed-income neighborhoods may require that the QAPs give priority to *mixed-income projects* in which LIHTC units and market rate rental units are included within the same development. The Louisiana Recovery Authority initially agreed to use the LIHTC and CDBG funding to give developers an incentive to build such projects.¹⁵⁹ Unfortunately, few developers were interested in those projects, thus no mixed-income projects were awarded when the first round of credits were allocated.¹⁶⁰ As a result, the LRA proposed to increase the tax credits available for one hundred percent LIHTC developments.¹⁶¹ Critics of this approach argue that such developments would continue to concentrate poverty and the social problems that accompany it in New Orleans.¹⁶²

2. *Using LIHTC Units to Provide Emergency Shelter*

A natural disaster on the scale of Hurricane Katrina results in thousands of displaced residents in immediate need of some type

155. 26 U.S.C. § 42(d)(5)(C)(ii) (2004).

156. *Id.* The Secretary of Housing and Urban Development designates both the Qualified Census Tract and the Difficult Development Areas. *Id.*

157. *See* Freeman, *supra* note 109, at 9.

158. *See* Corkery, *supra* note 86 (discussing the risk that the LIHTC may be used to produce neighborhoods with concentrations of poverty). In the article, Bruce Katz, director of the Metropolitan Policy Program at the Brookings Institution, states that the housing credits should be used to build housing for a mix of income levels and in mixed-income neighborhoods to break the "enclaves of poverty." *Id.* (quoting Bruce Katz).

159. CONSEQUENCES FOR NEW ORLEANS, *supra* note 15, at 1.

160. *Id.*

161. *Id.*

162. *Id.* at 3.

of shelter. Residents without access to resources, whether due to low income before the storm or to job loss after, are in dire need of affordable housing to use as a base from which to rebuild their lives. Although not intended as a program for disaster relief, vacant LIHTC units outside of the disaster area can be used to provide temporary emergency shelter for displaced residents.

Housing developments funded by the project were used to provide temporary housing for Katrina victims. Effective August 29, 2005, the date that President Bush declared Louisiana, Alabama, and Mississippi disaster areas eligible for relief, the IRS temporarily suspended certain income limitation requirements for qualified projects in which vacant units were rented to displaced families.¹⁶³

During the temporary housing period established by the state housing credit agency,¹⁶⁴ a displaced person qualified for purposes of meeting the project's 20-50 or 40-60 test.¹⁶⁵ Furthermore, the project owner was not required during the temporary housing period to make attempts to rent to low-income persons any unit housing a displaced person.¹⁶⁶ The non-transient use requirement did not apply to any unit providing temporary housing to a displaced individual during the temporary housing period.¹⁶⁷ Rental restrictions were placed on the amount of rent that the displaced individual could be charged and existing tenants could not be evicted or have their tenancy terminated as a result of efforts to provide temporary housing for displaced individuals.¹⁶⁸

D. Eminent Domain and Tax Credits

The exercise of eminent domain in New Orleans without a comprehensive program designed to ensure the development of affordable rental housing within the City and throughout the region could lead to the creation of affluent segregated neighborhoods. The City would then lack a workforce made up of residents with a voice and vote in the City's future and would lack the cultural complexity that has been unique to New Orleans. Property would be transferred from the poor and working-class homeowners to private developers who would construct market-rate housing meant

163. I.R.S. Notice 2005-69, 2005-40 I.R.B. 622. Under the notice, a displaced individual was one who resided in an Alabama, Louisiana, or Mississippi jurisdiction designated for Individual Assistance by FEMA as a result of Hurricane Katrina. *Id.*

164. The period could not extend beyond September 30, 2006. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

to attract middle- and high-income residents. Such an idea is offensive and unfair to displaced residents who desire to return but lack the resources needed to rebuild their homes.

Too many municipalities failed to construct affordable housing in “urban renewal” projects of the past in which eminent domain was used to create vast parcels of land for redevelopment of so-called “blighted” areas. One of the best known examples of this failure is the Southwest Waterfront neighborhood in Washington, D.C., the site of the eminent domain controversy in *Berman v. Parker*.¹⁶⁹ The original plan for the redevelopment of the “blighted” area included housing for low-income residents, but “the planned provision for moderate or lower-income housing was never fully implemented Instead the project took on the most lucrative forms of development (middle and upper class housing) and neglected or abandoned schemes for economic integration.”¹⁷⁰ The equitable redevelopment of New Orleans demands that eminent domain and the LIHTC credits be used strategically and congruently to avoid neglecting the housing needs of residents who desire to return, but may lack the resources to do so.

V. CONCLUSION

Private entities can play an important role in closing the chasm between citizens’ demands and government’s abilities to meet them. LIHTC projects must be part of a comprehensive plan to rebuild neighborhoods in New Orleans. The inclusion of one or two LIHTC projects in a neighborhood that itself is not being rebuilt and strengthened will aid in rebuilding the City. While a comprehensive plan involves land use planning, including friendly and forced eminent domain (when necessary) to acquire needed properties, a plan for New Orleans should be even broader. It should include considerations such as: (1) community engagement in the process of selecting areas for eminent domain and for prioritizing certain areas for LIHTC projects; (2) regional approaches to problems, including reducing regulatory barriers such as exclusion-

169. 348 U.S. 26, 28-29 (1954). The area is once again under redevelopment. See generally Dana Hedgpeth, *Southwest Waterfront Will Finally Get Over the ‘60s*, WASH. POST, Oct. 9, 2006, at D1 (detailing current plans to rebuild southwest Washington D.C.).

170. Audrey McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 51 (2006). Professor McFarlane discussed whether local governments are limited in their ability to use eminent domain to reconfigure urban areas to attract affluent residents. *Id.* at 40-60.

ary zoning ordinances and practices to promote affordable housing;¹⁷¹ (3) workforce development;¹⁷² (4) improved schools;¹⁷³ and (5) improved transportation.¹⁷⁴

The paradigms of “bulldoze and redevelop” versus empowering property owners one at a time are not mutually exclusive. Successful recovery programs always combine both strategies, while paying particular attention to low-income people and communities. For recovery programs to serve families and individual householders with low incomes, special efforts must be made to include low-income people in the process, treat them equitably, and provide sufficient technical and financial assistance so that everyone who wants to can go home again, if not to their own home, then somewhere nearby.¹⁷⁵

The goal of an inclusive community is not attainable without sacrifices. Local governments must be called upon to prudently exercise their rather expansive land use planning and regulatory powers along with their economic wherewithal to give New Orleans yet another chance.

171. KHADDURI & RODDA, *supra* note 94, at 8-9, 12-13.

172. *Id.* at 20, 24.

173. *Id.*

174. *Id.* at 20. These suggestions are part of a strategy to redevelop distressed neighborhoods. The same approach can apply to a strategy for rebuilding a destroyed neighborhood.

175. Werwath, *supra* note 49.