

Just Compensation Valuation Schemes After A Flood Disaster in France, California, and Louisiana

By Erin Darling,
Liz Skillen, and
Minming Wu

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With Professor Daniel Farber,
Boalt School of Law,
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ABSTRACT

Just compensation is critical to post disaster recovery in the wake of a devastating flood, especially when prior shortcomings of the government might be partially to blame. Assessing the full extent of compensation given to private landowners may help for future disaster flood recovery and planning. Despite profound geographic, demographic, and legal differences between France, Louisiana, and California a comparison of their post-disaster compensation models proves useful to identify past, present, and future models of a similar problem of post-flood redevelopment compensation outside of private insurance schemes.

Inquiring into eminent domain concepts surrounding just compensation principles in France, Louisiana, and California provides a framework for addressing post-disaster homeowner compensation. France supplies a model that demonstrates strong flood disaster prevention and land use planning measures alongside a full recovery compensation scheme. In contrast, Louisiana and California do not have explicit disaster compensation frameworks. Existing Louisiana law offers an existing legal and moral framework that can be applied by the state entity currently deliberating on post-disaster compensation program. California, on the other hand, currently offers the most unforgiving compensation scheme, but also has the time to adopt tailored flood compensation and planning principles.

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INTRODUCTION

Six months after the terrible flood that caused more than 23 deaths in her neighborhood, confusion still reigns. Every day, Jeannine Turpin, an elderly woman, leaves her temporary trailer home and visits her destroyed house close to the lower banks of the river. More than eleven years ago, Mrs. Turpin had left an inner-city neighborhood in the North to live out her retirement in a Southern city with a slower pace. With her entire life savings, she bought property in a sleepy, modest neighborhood. The real estate broker assured her that it was “certainly not floodable.”

She lived the next ten years in the neighborhood until one day, awoken by flood waters, she barely escaped the house with her life. Since the flood disaster that ravaged the entire city, the mayor has announced an intention to forbid any residential development in her neighborhood due to flood risk. The city would acquire her damaged home and compensate her for its fair market value. Some speculated that the government would pay generously. Others feared low-balling. Housed in a government trailer with a use time limit, Mrs. Turpin did not have much time to wait or many attractive options.

➤ *What problem does this paper address in disasters?*

This paper addresses the dilemma of Mrs. Turpin, a property owner in a sleepy southern city in France and one of many victims of a disastrous flood in 2002.¹ While Mrs. Turpin’s story ultimately had a happier ending, her dilemma is shared by many New Orleans residents in the wake of the Katrina disaster and with victims of flooding disasters in the U.S. and elsewhere. Through a comparative study, the objective of this paper is to identify how disaster-stricken

¹ « Inondations du Gard : les leçons d'une catastrophe, » by Jacques Moléna, *l'Express*, March 27, 2003. (Mrs. Turpin would later receive the pre-storm value of her house, drawn from the national Barnier funds, and a gift of developable land in the same city to rebuild a new home.)

homeowners like Mrs. Turpin may fare under different eminent domain compensation schemes in France, Louisiana, and California and identify lessons that each may offer.

In an eminent domain action, the legal foundation behind compensation begins with the U.S. Constitution's Fifth Amendment, guaranteeing that "nor shall private property be taken for public use, without just compensation." The compensation standard is the fair market value of the property taken.² However, within this standard, a surprisingly large range of values are possible.³

➤ *A right is as big as the courts will value it.*

The wide range of valuations attributable to one property demonstrates the deeply contextual nature of property rights. Valuation is essentially not about "arriving at a single 'true' value of property" but a value of that property against another interest.⁴ Compensation expresses the court's definition of the content of the right: "a right is as big, precisely, as what the courts will do."⁵ And courts have used the full range of valuation to express the strength of the public policy interest against that of the private property owner.

➤ *Why highly technical valuation techniques are relevant to justice and fairness*

The choice of valuation techniques, highly procedural regulations, determines the size of the rights we accord to disaster victims. Forced to shoulder dramatic losses due to forces beyond their control, these individuals face challenges in rebuilding. How much should public coffers assume? In most U.S. courts, this question has been relegated to district courts on remand.⁶

Most cases are unpublished.

² *United States v. 50 Acres of Land*, 469 U.S. 24, 25 (1984).

³ See, e.g., *Bassett, LLC v. United States*, 55 Fed. Cl. 63, 77-78 (2002), comparing plaintiff's appraisal of property at \$92,806,000 with defendant's appraisal at \$34,600.

⁴ 99 N.W. U.L. Rev. 677, 681.

⁵ Karl Nickerson Llewellyn, *The Bramble Bush* 84 (1960).

⁶ 99 N.W. U.L. Rev. 677.

➤ *The fair market value standard masks a bigger debate, a criticism of current schemes.*

Within the fair market value standard, there are, at least, nine different approaches to defining “fair market value.”⁷ Each expresses a different policy goal. Both in the United States and in France, arguments favoring full compensation instead of just compensation are made on both fairness and efficiency grounds. Full compensation “can force the government to internalize the costs of its actions,” making their actions more efficient.⁸ It can also distribute the costs of a public action more evenly across the public, ensuring that no one individual disproportionately shoulders the public burden.⁹

➤ *Looking for compensation rules for exceptional circumstances -- Leaving no stone unturned.*

Among the different angles taken in this paper, the paper also looks at rarely used, disfavored approaches like replacement value and examines its application in both Louisiana and France. Courts have carved out a few recognized exceptions for this approach.¹⁰ Procedural tools like the timing of the valuation are also important. According to the Supreme Court, takings are to be valued on the date the property is taken. After a disaster, this timing standard would produce a significantly low valuation for flood-damaged homes.¹¹ The announcement of eminent domain has an effect on the fair market value of the property itself as well.¹²

⁷ 99 N.W. U.L. Rev. 677.

⁸ Hanoc Dagan, “Just Compensation, Incentives, and Social Meanings,” 99 Mich. L. Rev. 134, 138 (2000).

⁹ *Albers v. County of Los Angeles*, 62 Cal. 2d 250, 263.

¹⁰ Exceptions recognized by courts for replacement cost valuation: where market value is not readily available,¹⁰ where uncompensable consequential damages would be extremely high, and when fair market value would result in manifest injustice.

¹¹ *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511-13 (1979).

¹² Courts are split. Some deny loss in value due to condemnation blight, applying “time of taking” rigidly. Other courts have rolled back the valuation date by finding a “de facto” taking prior to the actual taking. (*City of Buffalo v. J.W. Clement Co.*, 269 N.E.2d 895 (N.Y. 1971)) Other courts have adopted even more complex approaches. (*Vaizburd v. United States*, 384 F.3d 1278, 1281 (Fed. Cir. 2004))

➤ *The novelty of the law lends importance to a comparative approach.*

Despite profound geographic, demographic and legal differences between these three geographic areas, an additional reason for the comparative approach is the relative scarcity of literature and case law on the subject. Compensation valuation in the context of a post-disaster eminent domain action focuses on two neglected areas of law – disaster law and property valuation law. This paper tackles both, culling lessons from other frameworks that may address the topic more extensively.

The paper is divided into four parts: France, California, Louisiana, and Comparisons. Each of the sections tackles this topic through six questions: 1. What is the flood problem in this area? 2. What are the underlying legal principles for “just compensation” ? 3. Is there a special regime for compensation in cases of eminent domain used for pre-disaster flood planning? 4. Do special compensation rules apply in eminent domain claims after a disaster? 5. How do they treat land speculation? At what time is the valuation taken? 6. Are there alternative mechanisms for property owners to receive fair compensation

In the aftermath of Hurricanes Katrina¹³, shortcomings in the compensation of property owners reflect larger failings of the rebuilding process. Frustration in Louisiana – particularly in New Orleans - provides an impetus to examine alternative models of property owner compensation. The goal of this paper is to provide a few helpful prescriptions for Louisiana policymakers faced with the urgent challenge of compensating and rebuilding and California policymakers faced with the larger task of preventing a disaster or reducing the costs of a disaster to the government.

¹³ Devastation caused by Hurricane Rita was not as severe in New Orleans, and for the purposes of this paper Hurricane Katrina will stand as the causal agent of the mass damage in New Orleans.

NEW ORLEANS, LOUISIANA – THE CHAOTIC GUINEA PIG

1. What is the problem in New Orleans?

➤ *Hurricane Katrina and the attendant levee failures have damaged up to one hundred thousand homes in New Orleans alone. There was no existing public post-disaster property-owner compensation scheme.*

The devastation of Hurricane Katrina to housing in New Orleans is staggering. 105,000 homes have sustained flood damage according to a latest federal estimate.¹⁴ That is more than the total home damage from Hurricane Katrina in Alabama, Florida, Mississippi and Texas combined.¹⁵ Wealth in New Orleans has historically been housed on higher land, consequently the neighborhoods in the flood-plain, both low-lying and close to the breached levees are poor, working-class, and predominately African-American neighborhoods.¹⁶ Some of the neighborhoods hardest hit by the flooding from the breached levees -the Lower Ninth Ward, the Eight Ward – tend to have higher than average homeowner rates than comparable neighborhoods in other American cities.¹⁷ While it is uncertain how many of these homeowners will eventually return to New Orleans it is clear compensation for devastated or damaged homes will play a key role in determining how many people will be able to return. The question of shifting urban geography in New Orleans will be the answer to what kind of city will be rebuilt in the wake of Hurricane Katrina.

Louisiana has received \$6.2 billion dollars in Community Block Development Grants (CDBG) from the federal government, at least half of which will likely be spent on homeowner

¹⁴ Gordon Russell, *Louisiana Damage tops the list: state will use data to make case for aid*, New Orleans Times-Picayune, Mar. 11, 2006.

¹⁵ *Id.* (100,372 housing units were reportedly destroyed in those states).

¹⁶ Mike Davis, *The Predators of New Orleans*, Le Monde Diplomatique, Oct. 2005.

¹⁷ Peter Wagner and Susan Edwards, *New Orleans by the Numbers*, Dollars and Sense, Mar., 2006), <http://www.dollarsandsense.org/archives/2006/0306wagneredwards.html>

compensation.¹⁸ An additional \$4.2 billion has been promised by President Bush.¹⁹ Federal, state and local governments together will likely compensate private homeowners, but how will the level of compensation be determined? An inquiry into eminent domain, with its Constitutional promise for “just compensation” is helpful for determining the value to which private homes will be appraised and compensated. Even though eminent domain is a politically unpopular idea – and disavowed by New Orleans Mayor Ray Nagin²⁰ and Louisiana Governor Kathleen Blanco²¹ – it is clear that fair market value theories of valuation stem from eminent domain even if homeowner compensation plans contain no formal provisions for “takings.”²²

An inquiry into Louisiana state law on just compensation and fair-market value is helpful, even in the absence of the government’s use of eminent domain, in establishing a benchmark for private homeowner compensation. The current proposal from the state-entity entrusted with distributing federal money – the Louisiana Recovery Authority (LRA) – bases the private homeowner compensation scheme on “pre-storm value.”²³ How pre-storm value will be determined is still uncertain.²⁴ Due to the tremendous amount of indeterminacy of this goal, the inquiry into valuation standards from eminent domain principles can be used to establish a baseline for compensation that comes closest to making a homeowner “whole.”

Whatever compensation scheme is adopted, fair market value will likely be the starting point. How that benchmark can best be determined is the focus of this portion of our paper, and will be answered after an inquiry into Louisiana statutes and case law.

¹⁸ Louisiana Recovery Authority *The Road Home Housing Programs*. Mar. 5, 2006. (\$4.6 billion has been allocated to *The Road Home Housing Program*, \$3.5 billion for assistance to owner-occupants).

¹⁹ *Id.*

²⁰ Gordon Russell, *Buyout in Works* New Orleans Times-Picayune Feb. 12, 2006.

²¹ Robert Travis Scott, *Eminent Domain Bill has support from Blanco*, New Orleans Times-Picayune Apr. 5, 2006.

²² See *The Road Home* Louisiana Recovery Act. Mar. 5, 2006.

²³ Louisiana Recovery Authority *The Road Home Housing Programs*, 2 Mar. 5, 2006.

²⁴ E-mail interview with Mtumishi St. Julien, Member, Louisiana Recovery Authority, in New Orleans, La. (Apr. 21, 2006).

The inquiry into the valuation of post-Katrina homeowner compensation will first address the underlying legal principles behind just compensation. Second, we will answer whether special compensation rules apply before a disaster, and then whether special compensation rules apply after a disaster will be answered. This will be followed by a discussion on any alternative mechanisms being made available so property owners get “just compensation.” Last, the issue of speculation will be addressed.

2. What are the underlying legal principles for “just compensation” in Louisiana?

➤ *Eminent domain law in Louisiana traditionally uses comparable sales in determining fair-market value*

Just compensation for expropriation has traditionally been based on fair market value as guided by expert testimony.²⁵ “Fair-market value” (FMV) in Louisiana has been defined as what a willing seller would agree upon after free and open negotiations.²⁶ Comparable sales has been the primary method of determining FMV, in contrast to less favored techniques of capitalization of income and cost less depreciation.²⁷ Comparable sales as an approach is based on recent market transactions within the vicinity taking into comparison the condition of the property.²⁸ This has been the primary tool of analysis of FMV because in most cases it is “likely to produce more accurate results.”²⁹ The use of comparative sales is more accurate because it allows for the establishment of a market value baseline which can be adjusted relative to the “bad and good

²⁵ See e.g., *State Through Dep’t of Highways v. Smith*, 304 So. 2d 77 (La. App 1974 1st Cir.)

²⁶ Tracy Lee Howard, *Compensating an Owner to the Full Extent of His Loss: A Reevaluation of Compensable Damages in Louisiana Expropriation Cases*, 51 La. L. Rev. 822 (Mar. 1991).

²⁷ See, e.g., *State, Dep’t of Transp. and Dev. v. Hecker*, 493 So. 2d 125, 128 (La. App. 5th Cir. 1986); see also *W. Jefferson Levee Dist. v. Coast Quality Construction Corporation*, 93-1718 (La. 5/23/94); 640 So. 2d 1258, 1273, (describing capitalization of income as processing the anticipated net income of an investment; describing cost less depreciation as estimating the replacement cost of improvements and deducting there from the estimated depreciation, then adding the market value of the land).

²⁸ *Id.*

²⁹ *W. Jefferson Levee Dist. v. Coast Quality Constr. Corp.*, 93-1718 (La. 5/23/94); 640 So. 2d 1258, 1272.

features with regard to the expropriated property.”³⁰ Courts determine comparable sales from an adversarial process where both sides in an expropriation case present expert witness testimony to the comparative sales value.³¹ Criterion of market value is determined at the date of institution of expropriation proceedings.³²

➤ *The compensation standard for expropriation is putting the owner in as good a position he was in prior to the expropriation.*

The Louisiana Constitution of 1974 included an amendment to article I, section 4 which expanded the 1921 Constitution’s expropriation clause.³³ The 1921 Constitution gave a landowner the right to be “just and adequately compensated” a standard usually determined by the FMV of the property taken.³⁴

Article I, section 4 of the 1974 Constitution, granted the landowner the additional right to be “compensated to the full extent of his loss.”³⁵ The principle behind this was to extend “just compensation” to include placing an owner “in as good a position pecuniarily as he would have been had his property not been taken.”³⁶ The authors of the provision meant to expand the definition of “just and adequate compensation” in order to provide a property owner greater compensation for expropriation.³⁷ Under the Louisiana Constitution, an owner of property taken by the state would have rights that go beyond the rights to compensation provided by the Constitution of the United States.³⁸ The authors also intended to extend compensation to include damages broader than the loss in value of the property such as attorney fees, moving costs, and

³⁰ State, Through Dep’t of Highways v. Rosenblum, 344 So.2d 424, 425 (La. App. 1st Cir. 1977).

³¹ See e.g., State, Dep’t of Transp. and Dev. v. Hecker, 493 So. 2d 125, 128 (La. App. 5th Cir. 1986).

³² See e.g., State Through Dep’t of Highways v. Jenkins, 207 So. 2d 380 (La. App. 1st Cir. 1968).

³³ Lee Hargrave, *The Louisiana State Constitution: A Reference Guide* 21 (Greenwood Press 1991).

³⁴ Howard, *supra* note 12, at 827.

³⁵ La. Const. art. I, § 4 (1974)

³⁶ See, e.g., State, Through Dep’t of Highways v. Constant, 369 So.2d 699 (1979, La).

³⁷ Hargrave, *supra* note 21, at 28.

³⁸ State v. 1971 Green GMC Van, 354 So. 2d 479 (La. 1977); Louis Jenkins, *The Declaration of Rights*, 21 Loy. L. Rev. 9 (1975).

the cost of re-establishing a business whose premises had been taken (replacement costs).³⁹ The 1974 Constitution retained the standard by which a private property owner “has the right to a trial by jury to determine compensation.”⁴⁰ A jury’s factual determinations could be “disturbed” on appeal only if they were “manifestly erroneous.”⁴¹ Thus FMV, which was once the relied upon method that acted as a ceiling for compensation became a baseline.⁴²

“His” loss as opposed to “the” loss as the basis for compensation, demonstrates a willingness on the part of the Louisiana state legislature to put the owner of an expropriated property in as good a position financially as if the property had not been taken. The 1974 change can be seen as owner-based provision with a focus on making the possessor “whole” as opposed to the 1921 state Constitution version that focused solely on the objective value of the land expropriated as means for compensation.⁴³ However, the Louisiana state legislature gave little guidance in the 1974 provision or elsewhere as to the exact scope of damages awarded to a plaintiff whose property has been expropriated, and it was left to the courts to determine how far they could go in determining “full extent of his loss.”⁴⁴

The principle case following the 1974 constitutional revision was *State, Department of Highways v. Constant*, 369 So. 2d 699(La. 1979). The Louisiana Supreme Court held that marina owners whose property had been expropriated by the Department of Highways were entitled to recover, besides FMV for the land expropriated, replacement costs in constructing a new loading and parking area for their marina business operations.⁴⁵ The determination of replacements

³⁹ *Id.* at 28.

⁴⁰ La. Const. art. I, § 4 (1974).

⁴¹ *See, e.g.*, *State Through Dep’t of Transp. and Dev. v. Estate of Davis*, 572 So.2d 39 (La. 1990)

⁴² *Constant* 369 So. 2d 699, 702 (La. 1979), (stating a homeowner “not only be paid the market value of the property taken...but also such that an owner be put in as good a position pecuniarily as he had been had the property not been taken.”).

⁴³ Howard, *supra* note 12, at 827.

⁴⁴ *Id.* at 825.

⁴⁵ *State, Through Dep’t of Highways v. Constant*, 369 So.2d 699, 701 (1979, La).

costs was based on the cost of repairing fully the loss to the loading and parking area that occurred from the taking. The Court applied the general standard of putting the business owner in as good a financial position as he would have been had the property not been taken.⁴⁶ In expanding what was compensable the court departed from the “res” concept of awarding damages for the thing (land) itself, and instead focused on the disturbance to the property owner in relation to the “res.”⁴⁷ In helping define what kind of expansion courts should apply following the 1974 Constitution’s change to article I section 4 the Supreme Court of Louisiana suggested a possible limiting qualification that replacement cost is not always the “most appropriate measure of awarding a landowner compensation.”⁴⁸

In applying *Constant* Louisiana courts have awarded damages other than fair market value when the property is “unique” or “indispensable” to a property owner.⁴⁹ However replacement costs are usually seen as incidental damages, denied because they do not pertain to the market value of the property itself.⁵⁰

In practice, since *Constant*, the use of any particular valuation method derives from the focus on placing an owner “in as good a position pecuniarily as he would have been had his property not been taken.”⁵¹ This approach is characterized by an understanding that “the constitution does not limit the courts to one or another method of calculating the value, requiring only that the approach used will result in an amount that fully compensates the landowner for the loss.”⁵² Specifically this means courts rely on comparable sales as a starting point in determining

⁴⁶ *Id.*

⁴⁷ Howard, *supra* note 12, at 827.

⁴⁸ *Constant*, at 707.

⁴⁹ Howard, *supra* note 12, at 828. *Constant*, at 606. See also, *State, Dep’t of Transp. & Dev. V. Lobel*, 571 So. 2d 742 (La. App. 2d Cir. 1990), writ denied, No. 91-C-0047 (La. Feb. 8, 1991).

⁵⁰ Howard, *supra* note 12, at 828.

⁵¹ *See, e.g.*, *Constant* at 702.

⁵² *State, Dep’t of Transportation and Development v. Hecker*, 493 So. 2d 125, 128 (La. App. 5th Cir. 1986).

FMV but may apply other techniques, including replacement costs when a judge deems it necessary for just compensation.

An example of this landowner-specific approach to “full compensation” can be found in *State, Department of Transportation and Development v. Hecker*, 493 So. 2d 125 (La. App. 5th Cir. 1986). In deciding the compensation for an expropriation of a bulk oil distribution facility in Jefferson Parish, the Court of Appeals mentioned three “traditional” methods of estimating FMV: comparable sales, capitalization of income and cost less depreciation.⁵³ The Court of Appeals rejected these methods, and accepted the landowner’s argument for replacement costs.⁵⁴ Instead, the landowner’s pecuniary position was evaluated “only in terms of making him whole vis-à-vis the taking.”⁵⁵ The landowners and their expert witnesses documented the insufficiency of the state’s deposit by pointing to the several hundred thousand dollars the landowners had to spend to place themselves back in business. The court went on to award replacement costs, attorney fees and expert witness fees to make the owners whole.⁵⁶

The court of appeals in *Hecker* awarded attorney’s fees at the statutorily provided maximum: 25% on the net amount of the judgment.⁵⁷ The *Hecker* court acknowledged that “the trial court has much discretion in awarding attorney’s fees” but pointed to a number of factors “as pointed out in numerous cases” that warranted awarding the maximum.⁵⁸ These included the complexity of the case, the responsibility required of the attorney, his skill, knowledge and diligence, the result obtained, and the work performed.⁵⁹

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 129.

⁵⁶ *Id.*

⁵⁷ *Id.* at 130.

⁵⁸ *Id.* at 130

⁵⁹ *Id.* at 130 relying on *State, Dep’t of Transp. and Develop. V. Tynes*, 433 So. 2d 809 (La. App. 1st Cir. 1983)

Similarly, *Hecker* applied the standard method for determining awards for expert witnesses. Acknowledging the discretion given to the trial court, the appeals court articulated the criteria that witness fees must be reasonable and based upon the usefulness of their testimony.⁶⁰ Finding the allowance for three experts to be low based on their expertise and time spent on the case, the court amended and raised the awards.

3. Does Louisiana provide a special regime for compensation in cases of eminent domain used for pre-disaster flood planning?

- *The effects of Hurricane Katrina demonstrate the shortcomings of federal, state and local disaster flood planning. Louisiana did have special expropriation laws for levee construction, which perhaps belied a sufficient skill in their construction.*

The system of levees and floodwalls designed to protect New Orleans from flooding from the Mississippi river, intense precipitation and hurricanes has been the primary disaster preparation method for over a century.⁶¹ The importance of levees to the safety of New Orleans, and southeastern Louisiana in general is reflected in Louisiana law. The respect given to levee construction in Louisiana legal framework however, does not correlate with levee maintenance or disaster preparation, of which the numerous failures during Hurricane Katrina are beyond the scope of this paper.

The Louisiana Constitution, article 1 section 4 on expropriation contains in its last part, section (E): “This section shall not apply to appropriation of property necessary for levee and levee drainage purposes.”⁶² The effect of this provision was to free levee construction boards from just compensation costs when they expropriated land for levee construction or drainage purposes. This legislative set-aside is indicative of the importance of levee construction for pre-disaster flood planning.

⁶⁰ *Id.*

⁶¹ Nicole T. Carter, *New Orleans Levees and Floodwalls: Hurricane Damage Protection*, CRS Report for Congress, Sep. 6, 2005.

⁶² La. Const. art. I, § 4 (1974).

In 1985, the legislature amended Chapter 4 of title 38 of the Louisiana Revised Statutes of 1950.⁶³ Prior to amendment, levee districts could acquire property by servitude.⁶⁴ The new provision, section 351, allows a levee district to expropriate property whenever it “cannot appropriate or amicably acquire immovable property needed for levee purposes, including but not limited to flooding and hurricane protection purposes.”⁶⁵

However, there was no statute prior to 1985 mandating compensation for land expropriated for levee construction or maintenance. The 1985 amendment brought Louisiana levee appropriation standards in line with article I, section 4’s “full extent of his loss” standard.⁶⁶ Courts have interpreted this just compensation requirement to be based on the FMV of the property taken, which is its highest and best use as of the date of the taking, and to include severance damages when the taking has adversely affected the value of the remainder of the property.⁶⁷

Measure of compensation for property expropriated by a levee is determined as of the time the estimation is deposited into the registry of the court.⁶⁸ Measurement of damages is determined on a basis of immediately before and immediately after the expropriation⁶⁹ with the levee district giving its value first.⁷⁰ Also, attorney’s fees may be awarded “if the amount of the compensation deposited in the registry of the court is less than the amount of compensation awarded in the judgment.”⁷¹ Most significantly, the owner shall be compensated to the full extent

⁶³ La.R.S. 38 § 301

⁶⁴ *Id.*

⁶⁵ La.R.S. 38 § 351

⁶⁶ La. Const. art. I, § 4 (1974).

⁶⁷ La.R.S. 38 § 387; *West Jefferson Levee District, v. Mayronne*, 595 So. 2d 672, 679 (La. App. 5 Cir. 1992).

⁶⁸ La.R.S. 38 § 387(A)

⁶⁹ La.R.S. 38 § 387(B)

⁷⁰ La.R.S. 38 § 387(D)

⁷¹ La.R.S. 38 § 387(E)

of his loss.⁷²

4. Does Louisiana provide special eminent domain compensation rules for disasters?

- *The state of Louisiana and city of New Orleans had no legal rules in place to deal with the prospects of a post-flood compensation for property owners. The lack of a disaster compensation scheme parallels the lack of flood preparation in the wake of a Category 5 hurricane.*

5. How does Louisiana treat land speculation? At what time is the valuation taken?

- *The value of compensation in any expropriation is “at the time of the taking.” Where the potential use of a property is in dispute, valuation is pegged at the property’s “highest and best use” if such use is not speculative.*

The real estate market in New Orleans has seen a huge rise in property value for homes on high ground.⁷³ Combined with the uncertain future of low-lying neighborhoods New Orleans has seen a strong real estate investment boom that can be called “speculation.” However this kind of land speculation has little legal restriction in Louisiana. A second type of land speculation in the context of expropriation is addressed by Louisiana law, one which deals with the speculation about the type of land use that would have occurred but for the expropriation. In that case, the principle of “highest and best use” is applied.

Under the “highest and best use” doctrine, the landowner is entitled to compensation, based on the highest-valued potential use of the property at the time of the expropriation, even though the property is not being utilized for that purpose at that time.⁷⁴ Provided such uses are not speculative, remote or contrary to the law, a landowner is entitled to compensation based on FMV.⁷⁵ In *West Jefferson Levee District v. Coast Quality Const. Corp.*, 640 So.2d 1258 (La. 1994) a suburban New Orleans levee district along with the Army Corps of Engineers

⁷² La. R.S. 38 § 387(C)

⁷³ Gordon Russell *All over the Map*, New Orleans Times-Picayune, Jan. 27, 2006.

⁷⁴ *Pontchartrain Levee Dist, v. St. Charles Airline Lands, Inc.*, 03-1292 (La. App. 5th Cir. 4/27/04); 871 So. 2d 674, 680

⁷⁵ *W. Jefferson Levee Dist. v. Coast Quality Construction Corporation*, 93-1718 (La. 5/23/94); 640 So. 2d 1258, 1273.

expropriated land being used to construct a private levee being built to protect a planned housing subdivision. The issue was whether the “highest and best use” of the property at the time of the takings was undevelopable wetlands as the levee district argued, or a residential and commercial development as the developers argued.⁷⁶ Because a permit was necessary for construction, the burden of proof fell on the developers to show there was a reasonable probability of obtaining the correct permits in the reasonably foreseeable future.⁷⁷ Other factors from previous cases for determining highest and best use were:⁷⁸

- 1) market demand;
- 2) proximity to areas already developed compatible with the intended use;
- 3) economic development in area;
- 4) specific plans of businesses and individuals including action already taken to develop land for that use;
- 5) scarcity of land available for that use;
- 6) negotiations with buyers interested in the property taken for a particular use;
- 7) absence of offers to buy the property made by buyers who would put it to the use argued; and
- 8) use of the property at the time of the taking.

After noting that article 1, section 4 did not apply to levee expropriations, the District Court held that compensation would be pegged at the FMV the land was worth as a wetlands not what it would be worth if developed into a housing subdivision. Citing the fact developers had not applied for the proper permits, and a recent Congressional action to turn the land into a federal park, the court held the residential development to be speculative. FMV as the “touchstone” of valuation only applied to situations when potential uses could be established by a developer.⁷⁹

Thus a determination of “highest and best use” is at the time of the takings. Provided the owner can demonstrate it is reasonably probable the property could be put to this potential use in

⁷⁶ *Id.* at 1263.

⁷⁷ *Id.* at 1275.

⁷⁸ *Id.* at 1274

⁷⁹ *Id.* at 1273.

the not too distant future, absent the expropriation, and provided such a use would have an effect on the price a buyer is willing to pay.⁸⁰

6. Are there alternative mechanisms for property owners to receive fair compensation in Louisiana?

➤ *Louisiana had no disaster compensation scheme prior to Hurricane Katrina. The Louisiana Recovery Authority (LRA) is the state-entity formed to distribute the federal Community Development Block Grants (CDBG).*⁸¹

The LRA is the primary way individual homeowners will receive compensation for damage or loss to their home.⁸² Fully funded, the LRA will distribute \$10.4 billion, almost \$6.4 billion of which devoted to assistance for owner-occupants.⁸³ The general plan for the LRA is to provide individual homeowners assistance up to \$150,000 in order to repair, replace, or relocate.⁸⁴ The total assistance package consists of a grant and an “affordable loan package.”⁸⁵ The general formula for homes that are to be repaired or rebuilt is to provide a grant equal to the pre-storm home value, minus any insurance settlement or FEMA grant. For homeowners who were living in the floodplain with no flood insurance, there is a 30% penalty on the ensuing grant amount. The total grant amount will be capped at \$150,000.⁸⁶ As not to incentivize people to leave Louisiana, homeowners who choose to buy a home in another state will be awarded a grant

⁸⁰ *Id.*

⁸¹ Louisiana Recovery Authority *The Road Home Housing Programs*, 7 Mar. 5, 2006. (The program is contingent on the additional \$4.2 billion in CDBG funding to the initial \$6 billion offered by President Bush in the fall).

⁸² *Id.* at 2. (“The Road Home” includes a plan for rentals, though it must be noted that compensation addressing rental units is disproportionately less than the total renters in New Orleans effected by Katrina).

⁸³ Louisiana Recovery Authority *The Road Home Housing Program: Action Plan for the Use of Disaster Recovery Fund* 4 Mar. 5, 2006.

⁸⁴ Louisiana Recovery Authority *The Road Home Housing Program: A Blueprint for Building a Safer, Stronger, Smarter Louisiana. Homeowner Program Descriptions*. 2.1 Mar. 5, 2006. (“Repair” is defined as rehabilitating a home to minimum standards of the program, “replace” is defined as rebuilding a new home when repairs are too costly on the site of the old home, and “relocate” is defined as purchasing or building a new home in a “designated area in Louisiana.”).

⁸⁵ *Id.* at 13. (It must be noted that the low-rate loan package lacks any specifics regarding interest rates and qualifications).

⁸⁶ *Id.*

of only 60% of pre-storm value.⁸⁷

The key goals of the LRA are to prioritize safer and smarter rebuilding in Louisiana according to new state building codes and FEMA base flood advisory elevations, get people back in their homes so as to protect their equity, and to apply uniformly a program to all Louisiana homeowners.⁸⁸ To qualify for compensation one must be a homeowner, living in a home just prior to Hurricane Katrina which sustained major or severe damage.⁸⁹ The home must have been under or un-insured, or under or un-compensated, and currently cannot be repaired cost effectively.⁹⁰

Any fears of overcompensation in the LRA plan may be allayed by the \$150,000 limit on LRA assistance. Overcompensation concerns are also muted by the 30% reduction for homes in the floodplain with no flood insurance, which will most likely affect older low-income homeowners who have paid off their mortgage and could not afford insurance.

The pre-Katrina valuation framework of the LRA is based on the concept of making owners “whole.”⁹¹ Despite this use of an eminent domain principle, the timing of valuation will differ from a normal expropriation approach in that the LRA plan’s compensation is pegged at what is referred generally to as “pre-storm value.”⁹² The apparent logic of pre-storm value being “just compensation” could not occur from a valuation following Katrina's devastation to homes and thus home values.

Despite the fairness concerns addressed by the LRA's use of pre-storm value, the question remains: what is “pre-storm value”? How is pre storm value measured? There is no

⁸⁷ *Id.* at 4.

⁸⁸ *Id.* at 2.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Telephone Interview with Mtumishi St. Julien, Member, Louisiana Recovery Authority, in New Orleans, La. (Mar. 29, 2006).

⁹² LRA Housing programs, *supra* note 62.

definition of pre-storm value in the LRA's *the Road Home* plan, and as of April 19, the LRA does "not know yet" how pre-storm value will be determined.⁹³ Yet the amount offered by the LRA grants hinges on pre storm value. If the LRA is to meet its goals of fostering redevelopment within Louisiana and allow homeowners to return home by being made "whole" then pre storm value must accurately reflect the increasing property values of pre-Katrina New Orleans. The larger the pre-storm value, the larger the grant offered, and the more likely it will be for individual homeowners to overcome the significant hurdles and be able to return and rebuild in New Orleans.

➤ *Ways of Defining Pre-Storm Value*

Since the measurement of "pre-storm value" will play a key role in the rebuilding of New Orleans it is important the LRA follow a consistent principle based on existing equitable standards. Eminent domain principles can provide such guidance. In both normal expropriation procedure and LRA compensation, government is providing compensation for property it is responsible for rendering unusable. Local, state and federal government were substantially at fault for the property damage experienced by homeowners after Hurricane Katrina.⁹⁴ Though the LRA is a voluntary program and is not operating under a constitutional obligation to provide homeowner compensation, its role in the rebuilding process stems from the moral responsibility all levels of government have for the massive failures of Katrina.

Eminent domain principles are relevant not only because they provide the best legal explanation for the responsibility of government to property owners for substantial failure in levee maintenance, but also because they provide the best existing legal framework for the administration of fair compensation. Without eminent domain principles, the LRA might rely on

⁹³ Louisiana Recovery Authority *The Road Home Housing Programs*, 7 Mar. 5, 2006; E-mail interview with Mtumishi St. Julien, Member, Louisiana Recovery Authority, in New Orleans, La. (Apr. 21, 2006).

⁹⁴ United Press International, *Corps of Engineers Admits Design Failure*, Apr. 6, 2006, Science Daily.

other forms of valuation that are likely to be more imperfect. Eminent domain tools like FMV and replacement costs provide, for the purposes of logistics and fairness, approaches for making individual homeowners whole while rebuilding New Orleans.

How the LRA might apply eminent domain principles of just compensation to individual homeowners will now be explored. In the absence of existing homes to base a comparable sales approach on in defining “pre-storm value”, the danger of the LRA relying on an alternative valuation in the absence of traditional FMV techniques will be discussed first. It will be followed by a treatment of the shortcomings and benefits of comparable sales, with a discussion focused on the importance of applying FMV standards as a baseline for pre-storm value. Last, replacement costs as the valuation method that represents the general goal of compensating an owner “to the full extent of his loss” will be sorted out and applied to the LRA.

➤ *Relying on non-traditional valuation techniques like tax-assessments to determine pre-storm value poses significant dangers.*

Tax assessments might be a seductive source of valuation since they provide a formally reported and recorded concrete number. LRA Director Andy Kopplin has said tax assessments could be part of the pre-storm value equation due to their supposed uniformity across parishes.⁹⁵ However tax assessments would not be helpful in the post-Katrina context, due in part to the much-criticized assessment practices in Orleans Parish.⁹⁶ There are seven independently elected tax assessors in Orleans Parish, as opposed to one professional (non-elected) assessor.⁹⁷ This “top heavy”⁹⁸ approach to property tax assessment partly explains the huge discrepancy between average sale prices for homes (the FMV) and the much lower average value set by the assessors.

⁹⁵Gordon Russell and Laura Maggi, *Fix Up Grants May Depend on Elevation*, New Orleans Times-Picayune, Feb. 22, 2006.

⁹⁶ *Id.*

⁹⁷ Gordon Russell *All over the Map*, New Orleans Times-Picayune, Jan. 27, 2006.

⁹⁸ Russell, *Fix Up Grants*, *supra*, note 58.(2 less)

In 2004 this constituted a gap of 100% according to special report by the *New Orleans Times-Picayune* on property values in Orleans parish.⁹⁹ The report found on average that homes assessed at \$75,000 or lower (one third of the houses surveyed) fetched for \$115,86 on the open market.¹⁰⁰ The pre-Katrina real-estate boom in Orleans parish caused an estimated 31% increase in average home value from 1999 to 2003.¹⁰¹ Yet tax assessment value lagged far behind increases to market value, with more than half of the homes surveyed being valued at the same price which they were last sold for, which was on average ten years prior.¹⁰²

This pre-Katrina discrepancy between market value and tax assessor appraisals makes any reliance on tax assessments for the LRA determination of “pre-storm value” a dubious conjecture.

➤ *Comparable sales, despite shortcomings is the traditional approach for determining FMV and should be used to establish a baseline for pre-storm value.*

Even if pre-storm value is determined by fair market value there is a large amount of “wobble room” within that range. Louisiana law traditionally determines FMV by comparable sales.¹⁰³ However, comparative sales is not necessarily the most accurate model for all parts of New Orleans because of the range of size and conditions of homes within a neighborhood. For instance, many of the city's older neighborhoods, like Mid-City have blighted shotguns next to mansions, and any blanket approach to valuation within a vicinity may greatly under or overcompensate.¹⁰⁴ Another challenge is determining the condition of a home prior to Katrina in relation to the condition of homes from comparable sales within a certain vicinity is a difficult if not impossible task to document and verify. Last, comparable sales to determine a FMV in an

⁹⁹ Gordon Russell *Dubious Value*, *New Orleans Times-Picayune* Apr. 4, 2004.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ West Jefferson at 1273.

¹⁰⁴ Russell, *Dubious Value*, *supra*, note 65.

expropriation hearing is the task of a jury after weighing the testimony from competing expert witnesses. The LRA is not likely to have such an adversarial procedure due to administrative and time constraints, and valuation will likely occur without a homeowner's input into determining "his loss."

However, use of comparable sales has been the preferred method for determining FMV and it could be used by the LRA to determine pre-storm value. As has been mentioned earlier in Question 2 of the Legal Framework section, comparable sales were the "primary tool of analysis" of FMV because in most cases it was likely to produce more accurate results.¹⁰⁵ The existence of market data provides a concrete value for a home, and the technique of adjusting valuation to size, condition, and special features is a familiar process with a known set of variables. Most significantly, the ten-year period in the New Orleans housing market prior to Katrina saw a significant appreciation in home value.¹⁰⁶ Though home prices in certain neighborhoods appreciated faster than others, the trend occurred across Orleans Parish. It is likely then, that comparable sales signify the most uniform and highest value method for determining FMV and if used for determining pre storm value, would allow for the most generous LRA grants.

➤ *Replacement costs represent, not as a valuation technique but as a goal-oriented approach to compensation, the constitutional intent of Louisiana eminent domain law. This principle should be reflected in the LRA's approach to determining pre-storm value.*

Replacement costs tend to be more generous as damages and are generally seen as an exception, applied when comparable sales and other FMV approaches will not allow a homeowner just compensation. Though replacement costs are usually applied to a business owner's land that is "unique" or "indispensable" the goal underlying replacement costs is about

¹⁰⁵ W. Jefferson Levee Dist. v. Coast Quality Constr. Corp., 93-1718 (La. 5/23/94); 640 So. 2d 1258, 1272.

¹⁰⁶ Russell, *Dubious Value*, *supra*, note 65.

going beyond traditional techniques to effectuate compensation for the “full extent” of a property owner’s loss.

Due to the constraints of LRA assistance it is likely that homeowners will not be put in the same pecuniary position they were in prior to Katrina. In the allocation of finite resources, albeit at \$6.4 billion a large pot of finite resources, the LRA is likely to put downward pressure on the amount of money disbursed by its grants. This downward pressure may be further magnified without an adversarial process where a homeowner can establish their own valuation by use of an attorney and expert witnesses. Any administrative low-balling will primarily affect homes valued under the \$150,000 cap. This would disproportionately negatively affect low-income homeowners and contradict principles of fairness emphasized by the LRA’s mandate.

Replacement costs should be applied, not necessarily as a method of valuation but as a moral goal that corresponds with the existing “full extent of his loss” constitutional framework in Louisiana. The LRA should reflect the morals behind article 1 section 4 and apply the use of comparable sales as a de facto technique for determining pre-storm value but retain a flexibility in regards to methods so as to better approximate homeowner just compensation.

PROVENCE, FRANCE – THE CIVIL TEACHER

1. What is the problem in France?

➤ *Flooding constitutes the most expensive and most common natural risk to French cities.*

The territory of France is particularly vulnerable to flood risks. The most recent census reported that one in three French cities is either partially or totally exposed to flooding risk.¹⁰⁷ According to the most recent census, more than three hundred large cities are concerned.¹⁰⁸ The geographic breadth of the phenomenon also makes it the country's most costly natural risk; flooding makes up to 80% of the country's damage compensation attributed to natural risks.¹⁰⁹

The Mediterranean Arc in the South of France has borne the heaviest consequences and is among the country's most flood prone regions. An extensive system of levees and dikes locally and regionally maintained protect more than 300,000 inhabitants from flooding damage.¹¹⁰

Lessons from violent floods in the past have informed French legislation and Code development. On September 22, 1992, the entire city of Vaison-la-Romaine was suddenly flooded by the Ouvèze River. More than 320 homes were entirely destroyed and three districts along the river were wiped out. A rich architectural heritage dating back to the Roman Empire, some of the oldest monuments in France, were seriously damaged or destroyed.¹¹¹ Catastrophic floods hit again during the beginning of the rain season in 2002, originating from the Rhone River, and swept over the three-state-region of the Gard, the Vaucluse, and the Hérault.¹¹²

¹⁰⁷ *Official Flood Information Bulletin*, Ministry of Environment and Regional Development, December 15, 2000.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ "Inondations du Rhone et de ses principaux affluents de décembre 2003 dans les départements de la Drome, de l'Ardèche, du Gard, du Vaucluse et des Bouches du Rhône," Société d'Ingénierie pour l'Eau et l'Environnement, March 2004-June 2005.

¹¹¹ "La crue de 1992 à Vaison la Romaine," City of Vaison-la-Romaine.

¹¹² "Inondations dans le Gard des 8 et 9 septembre 2002," Météo France, SAC, Wetterzentrale, Midi Libre, Le Monde, La Provence, La Marseillaise, Hachette, September 13, 2002.

Finally, in December 2003, torrential rains caused a general failure of the levee system protecting cities and farmland around the city of Arles and in the Camargues Delta region of Southern France. More than one quarter (8 000 evacuees) of the urban Arlesian population was evacuated from their homes. The two cities of Fourques and Saint Gilles near the Camargues delta/wetland region not far from Arles were completely devastated.¹¹³ An international rescue effort followed with German, Italian, and Belgian relief workers arriving to pump floodwaters out of the city.

Despite an elaborate flood emergency plan called the Plan ORSEC, the government's prevention measures failed to protect the damaged areas from these catastrophic floods.¹¹⁴ Most of the governmental flood prevention management agencies pointed to the failure of the levees as the primary cause of the flooding.¹¹⁵ This section will analyze the general framework in France for compensation of properties at risk of flooding and flooded properties, with a few illustrative examples from this region.

2. What are the underlying legal principles for “just compensation” in France?

➤ *French constitution and Code mandate a “fair and previous” compensation, stressing a harms-based approach.*

Property owners subject to a governmental taking or an eminent domain action must be accorded a “fair and previous indemnity.”¹¹⁶ According to the French Declaration of Human and Civil Rights of 1789, “Property being an inviolable and sacred right, no one can be deprived of it, except when the public necessity, legally established, requires this, and on

¹¹³ “Inondations au pied de la digue,” *L’Humanite*, December 13, 2003.

¹¹⁴ Law 87-565 of July 22, 1987 : The ORSEC plans take an inventory of public and private measures possible in the event of a disaster and define how they may be executed and by whom. When a plan ORSEC is put into action, rescue operations are under the authority of the national government. [0]

¹¹⁵ “Inondations au pied de la digue,” *L’Humanite*, December 13, 2003.

¹¹⁶ Paragraph 17 of the French Declaration of Human and Civil Rights of 1789. Also, paragraph 544 of the 1804 Napoleonic “Code Civil” declares that, “no one can be required to surrender his property except in the case of public purpose, and on condition of a fair and previous indemnity.”

condition of a fair and previous indemnity.” The French Code of Expropriation specifies further the meaning of “fair” by stressing compensation for harms to the property owner.¹¹⁷ According to the Code of Expropriation, a fair indemnity must repair the “totality of the harm” to the property owner.¹¹⁸

Typical of civil law systems, French Code Law defines further two mandatory valuation categories that define the “totality of the harm”: primary compensation and ancillary compensation.¹¹⁹ Primary compensation focuses on compensation for the lost value of the actual property. Ancillary compensation includes all other costs involved in the relocation and reparation of harm, as defined and limited by the Code.¹²⁰ In most cases, ancillary compensation can not exceed primary compensation, making the primary amount critical to overall compensation.

For the valuation of the “primary” category, the Code sets forth three criteria: the date at which the property is estimated, the legal and physical “consistency” of the property, and the exclusion of any fraudulent or speculative improvements.¹²¹ The “consistency” of the property takes into account physical attributes of the property including buildings, plantings, fences, and even natural resources;¹²² meanwhile legal “consistency considers any covenants, existing servitudes, and easements on the land or buildings and any zoning prescriptions and

¹¹⁷ The Code’s first underlying principle of “previous” is defined as payment before the action of eminent domain. [0]The expropriator may only take possession “unless and until previous payment” has been made. In other words, payment must be made before possession takes place. (Expropriation Code. Art. L. 12-1 and 15-1). In practice, if the public authority does not pay before assuming possession, the property owner may simply claim interest on the payment. Expropriation Code, R. 13-78.

¹¹⁸ Article L. 13-13 of the Code of Expropriation

¹¹⁹ Expropriation Code, Article 13 and subsequent.

¹²⁰ Harms must be directly caused by the governmental action, material, and certain. C.C. no. 89-256 D.C. 25 July 1989. With these legal limitations, the practice has been such that actual compensation is often far from covering the total damages suffered by the property owner. (Le Masurier 379)

¹²¹ LeMasurier 403.

¹²² Cass. 3e civ., 3 octobre 1990, Cts Paquier-Rosset-Mambleu, AJPI, 1991, p. 188.

privileges.¹²³ Finally, the Code's strong anti-speculation measures will be discussed in a later section.

➤ *The role of the courts in eminent domain valuation*

Jurisdiction for eminent domain compensation is the province of a court devoted specifically to this question, the Court of Expropriation¹²⁴. These judges are responsible not only for determining compensation for eminent domain but also for inverse condemnation claims (*droit de délaissement*).¹²⁵ They also exercise considerable judicial discretion. Notwithstanding precise Code rules on property valuation, the judge has full and final authority on overall choice of evaluation method.¹²⁶ He may freely choose the evaluation method that he deems the best.¹²⁷ Valuation methods employed by courts include comparable sales, income or capitalization methods, replacement cost, attorney's fees, and benefit offset.¹²⁸

Legislative changes have attempted to counter judicial influence by strengthening the role of the State appraiser, "defender of the public purse," and eliminating the adversarial role of the private property appraiser as a "special assistant" to the judge.¹²⁹ The Code, in fact, establishes state appraisals as a compensation ceiling beyond which the judge can not go. In practice, the exceptions¹³⁰ to this rule are defined so broadly that courts habitually go beyond the state

¹²³ Expropriation Code art. L. 13-14.

¹²⁴ Ordonnance of October 23, 1958.

¹²⁵ Urban Code, Art. L. 210-1 et ss. LeMasurier 300.

¹²⁶ Cass. 3e civ., 17 janvier 1969, Ville de Paris, Bull. civ. III, no 61, p. 49.

¹²⁷ Cass. 3e civ., 30 mai 1972, Cts Bourgeon, Bull. civ. III, no 355, p. 256.

¹²⁸ Income or capitalization methods are not often used because rents can be highly variable in the same market and not considered a true reflection of market value. Replacement cost may be used to calculate the fair market value of the property if the property is so unique that neither comparable sales nor other methods suffice. The replacement cost is used as a base value and then discounted by physical or functional depreciation for age and condition of the building structure. Finally, both attorney's fees and benefit offset for partial takings are methods employed by courts. New Civil Procedure Code, art. 700. Expropriation Code Art. L.13-12. *COMPENSATION FOR EXPROPRIATION: A COMPARATIVE STUDY*, v.2, at 69 (Gavin M. Erasmus ed., 1990).

¹²⁹ Expropriation Code, art. R. 13-29.

¹³⁰ According to the Expropriation Code Art. L. 13-17, R. 18-43 to 13-45, primary compensation can not exceed the state assessor's estimation if a recent sale, within the past five years, was also the subject of a state evaluation. Expropriation Code, Art. L.13-16, part. 1. The judge may only exceed the evaluation of the state property assessor

assessor's valuation.¹³¹ In fact, expropriation judges often vigorously question the rationale behind the state assessor's valuation and state assessments are made with considerable deference to judicial precedent.¹³² Thus, despite parliamentary efforts, the simple choice of valuation methods remains one of the more powerful judicial levers. The court's facility in exercising this power and ruling in favor of property owners is well-documented in the case law.¹³³

➤ *The obligation to consider comparable sales, an effort to approximate fair market value.*

The market value standard was another legislative effort to reduce judicial discretion. Despite the liberty that judges exercise in determining evaluation methods, one of the few and seemingly intransigent Code limitations¹³⁴ is the "comparable sales" obligation, requiring the judge to "take into account" the most recent market transactions. While market value through a comparable sales method is consistently retained as the general standard,¹³⁵ French case law privileges the method only to the extent that comparable sales is always the first and obligatory method evaluated and compared against other valuation methods.¹³⁶ In practice, if a particular judge does not retain the method, he generally justifies any rejection of the comparable sales method in the judgment and provides reasons for substantial deviations that their valuation would have with comparable sales averages. Finally, in general, French compensation

if the property owner himself requests an amount higher than the state assessor. Le Masurier 430. In limited cases where more than half of the parcels required for the eminent domain project are acquired, recent "sales" become mandatory authority for subsequent judicial decisions. Code of Expropriation, Art. L.13-16, part. 1.

¹³¹ C. cass., ch. civ. III, 14 avril 1982, Bull. Civ. III, no. 88, p. 60.

¹³² Interviews with state assessors in the Provence region, Ministry of Finance and Taxes, Bouches du Rhone section of state assessors, 2005-2006.

¹³³ Cass. Civ. III 4 April 1978, Dame Funel, J.C.P. 1980 Ed. G. II 19317 note, A-H. B; Cass. Civ. III 3 October 1985, E.S.C.O.T.A., D.S. 1986, p. 78, note CARRIAS; Cass. Civ. III 13 April 1988, Consorts Cevoule, D.S. 1986, Somm. Comm. 103 note CARRIAS.

¹³⁴ The other Code limitations are : The date of the property valuation. The inclusion of legal and administrative servitudes. [0]Reference to and consultation of existing market transactions. References to evaluations by the property and tax assessor's offices. The judge is required by the Code to take into account these four criteria.

¹³⁵ Cass. Civ. III 20 April 1968, Hautin, Bull. Civ. III, n. 171.

¹³⁶ Cass. Civ. III 6 March 1984, Société d'Équipement de la région de Lyon, n. 83 7005. CA Versailles, 12 January 1982 Consorts Wautier, JCP 1982, Ed. G IV 260.

principles, like American courts, reject “the replacement cost” standard for an approach that blends market valuations with harm suffered to the property owner.¹³⁷

➤ *Comparable sales are inadequate in the context of a disaster*

In the context of flood prone or flood damaged properties, fair compensation based on comparable sales can be grossly inadequate. Every property parcel is unique and the definition of a comparable is difficult and highly discretionary, particularly in dense, urban areas where one city block may constitute several, diverse micro-market areas alone. Furthermore, condemned properties located in high risk flood areas do not have “comparables” because these properties are not normally placed on the market. Properties severely damaged by a flood are in a similar situation. Even if recent sales were to be found in a neighborhood, these averages would compensate property owners only for the soaked remnants of their property.

3. Does France provide a special regime for compensation in cases of eminent domain used for pre-disaster flood planning?

➤ *Flood prone properties are evaluated without taking into account the risk.*

The parliamentary law passed on July 13, 1982 that established a natural disaster compensation system also expanded public powers for disaster prevention and reduction. With respect to eminent domain, the law expanded its application, for public safety, to the public acquisition of properties at great risk of flooding. Furthermore, the law encouraged the development of local hazard mitigation maps, the American equivalent of FEMA flood maps. Although these measures were obligatory, the French legislature saw the need to strengthen these requirements with incentives to encourage municipalities to act.

In 1995, the French legislature enacted financial incentives to encourage both inverse condemnation and eminent domain actions for disaster prevention by creating a national fund

¹³⁷ C. cass., ch. Civ. III, 20 avril 1968, Bull. Civ. III, no. 171

available for eminent domain actions linked to disaster prevention.¹³⁸ Called the “Barnier Law” after the legislator that championed the effort, the law established a special valuation scheme for flood-prone and flood-damaged properties, carving out an exception in compensation valuation for natural disasters. The Barnier fund is financed by a tax on mandatory home, business, and car insurance premiums.¹³⁹

Under the Barnier Law, public authorities may take any land that may be at risk for flooding, subject to a cost benefit analysis.¹⁴⁰ If flood prevention measures prove more costly than condemning an area at risk of a natural disaster, the State may solicit Barnier funds to pay for voluntary sales from property owners or for forced sales in an eminent domain action.¹⁴¹ This authority is specifically limited to cases where economically-viable, alternative solutions do not exist.

The law intended both to expand public powers but to sharply limit its application to exceptional situations. The Ministry of Major Risks, Civil Security, and the Economy must identify zones sensitive to a natural disaster and requires that the regional administrator for the state evaluate the gravity of the danger and analyze the costs of eminent domain versus other alternative actions.¹⁴² In post-disaster situations, these powers apply uniquely to sudden, flood storms (*crues torrentielles*) where the risk is classified as a “grave danger” to human life; these

¹³⁸ Art. L. 561-3.

¹³⁹ Insurance Code, Art. L. 125-2.

¹⁴⁰ Code of the Environment, Art. L. 561-1.

¹⁴¹ The first time that such power has been used and then contested was in Grenoble, in a case concerning the risk of avalanche for a tiny ski village. The purpose of expanding eminent domain authority to property exposed to natural risks was to evacuate, under “just and equitable” conditions, individuals living in risk-prone zones. Circulaire no. 96-53 of July 10, 1996 in BOMETT no 21, August 10, 1996.

¹⁴² Mesures de sauvegarde des populations menacées par certains risques naturels majeurs, Decree no 95-1115 of October 17, 1995, *Journal Officiel*, October 19, 1995, p. 15256. The state has adopted both a carrot and stick approach to incentivize local disaster prevention. If a disaster occurs and the city had not yet made attempts to create the required disaster mitigation plan, its citizens pay higher deductibles than other cities in order to receive insurance compensation. “Floodplain Management and Mitigation in France,” Vincent R. Parisi, International Committee Chair, Association of State Floodplain Managers and FEMA V.

powers do not apply to periodic or gradual flooding in plains (crues de plaine).¹⁴³ The gravity of the harm is evaluated by the State through a multi-factor test.¹⁴⁴

4. Does France provide special eminent domain compensation rules for disasters?

➤ *Case Study: Flooding and compensation in the city of Collias.*

In the city of Collias, more than ninety five buildings were destroyed after torrential floods engulfed the village in September 2002. The State quickly declared a national disaster area. When the clean up began, with the assistance of updated state flood maps, the city prohibited rebuilding in 50% of the severely damaged areas, declaring the area uninhabitable and at high flood risk.¹⁴⁵ The state appraiser valued each of the condemned homes at their pre-storm value. Subtracting the amount of insurance compensation received for property damage from this value, the state drew from Barnier funds to meet the difference and compensate the property owner for the full pre-storm value.¹⁴⁶ To qualify for Barnier funds compensation, property owners need to provide an insurance company certificate, confirming that the home had suffered more than a 50% diminution in value from property damage.¹⁴⁷ In some cases, the city purchased properties from willing property owners at undisputed valuations. In many cases, Barnier funds, capped at 60,000 euors, were not enough and the city supplemented Barnier fund compensation with other types of aid to fully compensate property owners for the costs of relocation.¹⁴⁸

¹⁴³ Circulaire no. 96-53 of July 10, 1996 in BOMETT no 21, August 10, 1996.

¹⁴⁴ *Id.* The “gravity of the harm” test includes the following factors: conditions under which the risk may likely occur, particularly it’s probability, the period of warning between awareness and arrival, and the suddenness of the risk such that adequate safety measures are impossible to put into place.

¹⁴⁵ *Inondations du Gard : Retour d’expérience*, Préfecture du Gard, September 2003, p. 79-89.

¹⁴⁶ *Le Moniteur*, January 23, 2004, p. 23-55.

¹⁴⁷ « Inondations du Gard de Septembre 2002 : Retour d’expérience, Groupe d’appui et d’expertise scientifique, » Final Report, May 23, 2003, Ministère de l’Ecologie et du Développement Durable, pp. 83-89.

¹⁴⁸ In part due to the compensation gap in this and other flooding cases, the Bachelot law would be introduced a year later, removing the funding cap.

Before passage of specific compensation procedures for disaster-ravaged property, property owners were frequently under compensated under the former Code of Expropriation. If the damage or destruction happened before the eminent domain declaration or public inquiry, the expropriation judge could not compensate the owners for the damage in his decision. If the damage occurred after the declaration of eminent domain, the judge could compensate the property owner for destruction if the public powers had caused the destruction or demolition.¹⁴⁹ These Code regulations forced property owners to shoulder more of the loss caused by flooding damage.

➤ *Pre-disaster property value compensation for flood victims*

Since the Barnier Law in 1995,¹⁵⁰ pre-disaster eminent domain actions for flood prevention have highly specialized rules on compensation that apply to post-disaster acquisition of damaged properties. Legislation specifically permits compensating owners for flooded or flood-prone property at the full pre risk and pre-storm value of the property.¹⁵¹ Based on policy considerations of fairness, solidarity, and notice, the regulation attempts to protect property owners from having to shoulder the potentially crushing burden of disaster damage. Instead of compensating for the full extent of harm, the law intends to place the property owner in as good a position as he would have been if the government had not regulated his property.¹⁵²

More importantly, compensation is based on replacement cost, allowing property owners to be compensated at levels sufficient to buy replacement housing. This provision is an exception

¹⁴⁹ C. Paris, 10 décembre 1981, Epx Levrot, JCP, 1982-IV, p. 214.

¹⁵⁰ After the violent flooding of 1981 in the Saône and Rhône Valleys and in the Southwestern portions of France, the French Parliament established the country's natural disaster insurance compensation system. All French residents who have mandatory auto, home or business insurance are automatically covered for flooding. "Floodplain Management and Mitigation in France," Vincent R. Parisi, International Committee Chair, Association of State Floodplain Managers and FEMA V. The Barnier law would later introduce specific eminent domain compensation provisions.

¹⁵¹ Code of the Environment. Art. L. 561-1.

¹⁵² V. Hostiou R., "La loi Barnier et le droit d'expropriation," RJE, 1995 no 2, p. 252.

to the Expropriation's Code preference against replacement cost valuation.¹⁵³ However, the Barnier Law also placed limits on compensation. In a move to avoid double recovery, property compensation is reduced by insurance compensation.

➤ *Funding caps removed, compensation for all severely damaged property owners.*

In 2003, the Minister of the Environment, Roselyne Bachelot, further reinforced the Barnier scheme, in response to the catastrophic floods of September 2002 that damaged the city of Collias and a considerable area of the Gard region in Southern France.¹⁵⁴ The Barnier Law had capped compensation at 60,000 euros but, after the 2002 winter floods in Provence and the Gard region, the Bachelot law removed the cap.¹⁵⁵ The law also expanded compensation to include a “voluntary eminent domain” procedure. Even if property owners are not located in an area concerned by a public redevelopment project, property owners may voluntarily sell their damaged property to the government if damages exceed the 50% threshold.¹⁵⁶

Furthermore, the Barnier Law provides for a special eminent domain procedure of “extreme urgency” in cases of catastrophic flooding.¹⁵⁷ Prior to the Barnier Law, this procedure was reserved largely for National Defense or situations representing threats to national security.¹⁵⁸ The procedure allows for the taking of the property in a one-month period and compensation for any takings in no more than six months after the taking. In cases of flood disasters, the procedure is requested by the municipality and then must be approved by the Ministry of Major Risk Prevention, the Ministry of Civil Security, and the Ministry of Economy

¹⁵³ Expropriation Code, art. 13-13.

¹⁵⁴ Law no. 2002-276 du 27 février 2002, art. 159, *Journal Officiel* du 28 février 2002, loi no. 2003-699, du 30 juillet 2003, art. 60, *Journal Officiel* du 31 juillet 2003.

¹⁵⁵ « Préfecture du Gard, la reconstruction du Gard, un an après les inondations de décembre 2003, » rapport d'expérience du 1 décembre 2004.

¹⁵⁶ *Id.*

¹⁵⁷ Expropriation Code, Art. L. 15-6 to L. 15-9.

¹⁵⁸ Ordonnance of October 23, 1958, art. 58. Secret operations for national defense, operations requiring the temporary military occupation of land, or takings of patented inventions relevant to national security are three examples of such property takings.

and Finances, approved by the Supreme Court in a special, accelerated procedure. If approved, the Prime Minister issues a decree authorizing the taking of land.¹⁵⁹

5. How does France treat land speculation? At what time is the valuation taken?

Preventing speculative abuse is one of the three stated objectives of the Barnier Law's new compensation scheme.¹⁶⁰ Anti-speculation measures also figure prominently in the general Code of Expropriation for eminent domain. Together, in the context of flood prevention and post-flood compensation, property speculation is managed primarily through flexible standards on the timing of the valuation and procedural standards of presumption and burden of proof.

➤ *Property is generally valued at the time closest to the transfer of property*

The general rule is that the property is evaluated on the date of the first court judgment.¹⁶¹

If there are appeals, that reference date remains the same.¹⁶²

The valuation of real property is to be taken with regards to its value on the date of the first judgment and with regards to its consistency on the date of the public hearing for eminent domain. If there is no indication to the contrary, the compensation determined by the first judge is the date of his decision. The Appeals Court must necessarily place itself at this date for subsequent appellate valuations.¹⁶³

But these rules are complex, allowing the judge considerable discretion in applying different timing schemes. The policy rationale focuses on the closeness of this date to the time where the property owner must give up his property and find a replacement. Valuing the property to reflect the property market at the time that the property owner must find a replacement assists the property owner, by approximating more closely the market at the time of the transfer.¹⁶⁴

¹⁵⁹ Decree of October 17, 1995.

¹⁶⁰ Code of the Environment, Article L. 561-2.

¹⁶¹ Code of Expropriation, Art. L. 13-15.

¹⁶² Cass. 3e civ. 20 février 1980, Epx Garcia, Bull. civ., III, no. 46, p. 32.

¹⁶³ C. cass., ch. civ. III, January 14, 1998, AJDI, 1998, p. 186.

¹⁶⁴ Ordonnance of 23 october 1958 (art. 21)

➤ *Qualifications on timing designed to avoid compensating an owner for speculative changes in price due to the eminent domain announcement.*

The legislature developed two exceptions to this valuation timing, specifically to avoid speculation.¹⁶⁵ The most important exception allows the judge to evaluate the property anytime after the public announcement for an eminent domain study.¹⁶⁶ In practice, this rule allows courts to avoid compensating the landowner for post compensation speculation. But more importantly, it serves as a powerful disincentive for speculative buyers who profit from property owners' post-disaster financial needs.¹⁶⁷ Finally, this timing may also incentivize voluntary sale of condemned property to the public.¹⁶⁸ If property values rise after the eminent domain announcement, a property owner could negotiate a sale with the public body for a moderately higher price. The public body may acquire land at prices higher than fair market value as long as the price difference is moderate. Whereas if a property owners disputes the eminent domain valuation in court, he risks a judicial decision that sets the valuation timing at an earlier date than the date of judgment.

The Code also includes procedural standards that discourage speculative purchases, particularly for those who wish to contest the state's valuation.¹⁶⁹ First and foremost, courts are

¹⁶⁵ Expropriation Code, art. L. 1315-1 and the law of 10 July 1965, the law of 18 July 1985.

¹⁶⁶ In practice, this has generally meant one year after the eminent domain public inquiry. French law is complex in this area because it provides two dates of evaluation – one for background rules that determine the property's development capacity, another for the overall property value. A full discussion of the administrative details here is not possible. The question of timing is the subject of considerable academic literature and practitioner confusion. But the rationale behind this split timing is to avoid compensating the property owner for post-condemnation speculation without depriving him of the overall rise of the market during the eminent domain study. (Le Masurier 413.)

¹⁶⁷ In 2004, the municipality of Blois condemned the neighborhood of Bouillie, with more than 500 inhabitants, 138 homes, 18 businesses, and a stadium as a high flood risk area. Although the dislocated individuals and businesses will receive insurance and Barnier funds eminent domain compensation, residents who feared low compensation sold their homes for less than 60% of the fair market value of the home, according to the citizen's association of the neighborhood. "Inondations, un quartier de Blois va être rasé," *Le Monde* newspaper, November 2, 2004.

¹⁶⁸ Le Masurier 413

¹⁶⁹ *COMPENSATION FOR EXPROPRIATION: A COMPARATIVE STUDY*, v.2, at 69 (Gavin M. Erasmus ed., 1990).

permitted to reduce or penalize purchases made after the public announcement for an eminent domain inquiry.

Acquisitions of real-estate properties may give rise to no compensation or reduced compensation if, owing to the period in which they took place, it appears that they were made with the aim of obtaining compensation greater than the purchase price.¹⁷⁰

Improvements made after the eminent domain public inquiry announcements are also considered to have been made to increase the value of the land are not compensable.¹⁷¹ Maintenance repairs, however, are legal and are compensable.¹⁷² Because the line between a repair and an improvement can be fine, the Code mandates a presumption of speculative fraud on the property owner for all repairs and improvements that are made after the announcement for eminent domain.¹⁷³ The burden is therefore on the property owner to prove that his improvements were not speculative. However, if improvements are made before the public hearing, the burden of proof is placed on the public body to show that the property owner had knowledge of the planned public development.¹⁷⁴

Finally, even the public entity may be liable for permitting construction or improvement on a house situated within a proposed eminent domain area after the public announcement. In fact, any public permit for an improvement or change that may increase the property value may not be issued until the conclusion of the eminent domain procedure.¹⁷⁵ If a public authority grants such a permit, he is required to reimburse the

¹⁷⁰ Expropriation Code, Article 561-2.[0]

¹⁷¹ Expropriation Code, Art. L. 13-14.

¹⁷² C. Paris, 18 mars 1982, Epx Baldassini, AJPI, 1982, p. 507.

¹⁷³ Le Masurier, p. 410.

¹⁷⁴ *Id.*

¹⁷⁵ Code of the Environment, Art. L. 561-5.

national disaster prevention fund for the entire cost of the publically-acquired property.¹⁷⁶ Similarly if any work was carried out prior to the hearing, signaling the project, the change in value caused by that news is to be disregarded during the three years before the hearing.¹⁷⁷

Furthermore, with regard to flood prevention, the full compensation (valuation without risk) scheme prompts speculative concerns of another kind. The Barnier Law of 1995 revised the Code of Expropriation to include provisions barring purchasers from windfall profits based on consciously opportune land acquisition.

Unless proven otherwise, acquisitions are presumed to have been made with this aim when they are made after the opening of the public enquiry prior to the approval of a plan for the prevention of foreseeable natural disasters making the zone concerned unsuitable for building or, in the absence of such a plan, after the opening of the public enquiry prior to expropriation.¹⁷⁸

The procedural standard creates a presumption, albeit rebuttable, of speculation based solely on the timing of an acquisition, after a project is made public. The property owner carries the burden of proof and must demonstrate that such a purchase was not made to enjoy a high compensation value or was made without knowledge of such a compensation scheme.¹⁷⁹

6. Are there alternative mechanisms for property owners to receive fair compensation in France?

Property owners, however, may also find relief in the second category of normal compensation damages, focused on the harm suffered by the property owner. Ancillary

¹⁷⁶ *Id.*

¹⁷⁷ Code of Expropriation. Art. L.13-15.

¹⁷⁸ Code of Expropriation, Article L. 561-2, official English translation.

¹⁷⁹ Neither enhancement nor blight (change in property value) due to the public project is to be considered in determining fair market value. CCP Section 1263.330. See also *United States v. Miller*, 317 U.S. 369 (1943) and *Merced Irr. District v. Woolstenhulme*, 4 Cal.3d 478 (1971). *COMPENSATION FOR EXPROPRIATION: A COMPARATIVE STUDY*, v.2, at 69 (Gavin M. Erasmus ed., 1990).

compensation covers all damages, losses, or expenses incurred by the dispossessed in relocating to an equivalent site.¹⁸⁰ This category includes notary fees, title, and registration fees. The public buyer is required to pay in all situations even if the owner decides not to relocate.¹⁸¹ The ancillary compensation helps bridge the gap between the property value and the cost of the total harm suffered by the property owner. But its amount depends strongly on the principal compensation and courts are subject to strict guidelines. In most cases, ancillary compensation can be from 15 to 20% of the primary compensation. The code requires that the judge explain clearly in his judgment the exact losses compensated and how they were assessed.¹⁸² Itemized indemnities for objects on land can also be required – mineral deposits, crops, fixtures, trees, mines.¹⁸³ Courts may also reduce ancillary amounts if the primary compensation is large.¹⁸⁴ Notwithstanding this additional category, the primary compensation scheme, under the *Barnier* law, already provides a specific scheme for disaster compensation.

Anti-speculative measures reveal both a strength and significant drawbacks of the French system.

While strong anti-speculation measures are one of the strengths of the system, they also reflect some of the drawbacks of the French system. This paper focused on a few advantages of a special eminent domain compensation system in floods: consistency, transparency, and fairness. Property owners in floodplains know to expect a consistent scheme for both natural disaster prevention and rescue. The transparency of valuation regulations, specified at a level of precision in the Code, encourages development in areas deemed “safe” for development by the government. Finally, through strong anti-speculative measures, these laws strive to reduce

¹⁸⁰ Expropriation Code, Art. R. 13-46.

¹⁸¹ C.A. Paris, May 9, 1985, COFERIARCER, A.J.P.I. 1985, p. 481.

¹⁸² Art. L. 13-6

¹⁸³ Cass. Civ. III 29 April 1981, Ministère de l'Équipement, J.C.P. 1982 II 19738, note A.H.B. D.S. 1982 III, p. 639, note GILLI.

¹⁸⁴ Cass. Civ. III, 25 June 1980, SARL “Les champs de Mondeville,” Bull. Civ. III, n. 124.

abuses of the system and opportune purchases that exploit disaster victims, particularly lower income victims.

The drawbacks, however, of the system should also be duly considered. This special compensation scheme is often criticized on two grounds: reducing incentives for strong disaster prevention measures and exposing public coffers to greater financial vulnerability. Viewed as too protective and generous by its critics, the system's strongest critics are insurance companies, required by state law to offer certain insurance products at fixed minimum prices and taxed on the other hand to create revenue flow for the national fund.¹⁸⁵

Proponents of the system argue otherwise. While the state may regulate and tax insurance companies, the disaster prevention and insurance laws create a stable and captive market for insurance companies. All French residents are required to carry home, business, or auto insurance. Notwithstanding this critique, the compensations system is a work in progress.¹⁸⁶ The frequency of legislative reform of this procedure since 2000 reveals in part the relative fragility of the system.¹⁸⁷

¹⁸⁵ P. Bidon, "Indemnisation des catastrophes naturelles de la naissance vers l'âge adulte," *Risques*, numéro 42, juin 2000, p. 80.

¹⁸⁶ France's current system is the result of numerous legislative reforms dating as far back as legislation in 1982 (lois du 25 juin 1990, 16 juillet 1992, 2 février 1995, 27 février 2002, 30 July 2003, 13 August 2004).

¹⁸⁷ "Indemnisation des catastrophes naturelles: des réflexions sont en cours," *Journal des accidents et catastrophes*, février 2005.

SACRAMENTO, CALIFORNIA – THE NEXT BIG FLOOD

1. What is the Problem in California?

➤ *The Del Paso Heights Neighborhood in the Natomas Region of the Sacramento could be the next Ninth Ward.*

The destruction and lasting impact of Hurricane Katrina brought flooding to the forefront of natural disaster concerns in California. Once overshadowed by earthquakes, apprehension regarding flooding in California is no longer limited to the weatherman's warning about the potential for landslides. Like New Orleans, many neighborhoods in Sacramento are below sea level.¹⁸⁸ The Natomas region bordering the American River is especially susceptible to flooding as the levees protecting this area are in need of repair and this area is in the direct path of flash floods in the event of a breach of Folsom dam¹⁸⁹. Like the Ninth Ward of New Orleans, the Del Paso Heights neighborhood adjacent to the Natomas region is not only poverty stricken¹⁹⁰ and primarily residential, but according to flood maps, it is also susceptible to floods ranging from five to seventeen feet. As of the 2000 census, almost 35,000 people reside in Del Paso Heights and there are 5,486 owner occupied homes and 4,704 rental units, all susceptible to extensive flooding.¹⁹¹ Unless California overhauls the levee system, the Natomas region will be very susceptible to a disaster of Hurricane Katrina proportions, and Del Paso Heights may become the next Ninth Ward.

¹⁸⁸ Behind the Levees, what's real risk? Floodplain Experts say Insurance Rules Map and Unverified Safety Zone, Carrie Peyton Dahlberg, Sacramento Bee, January 23, 2006, page A1

¹⁸⁹ The 1986 flood almost breached Folsom dam as the flood exceeded the dam's design capacity by almost 20 percent. Currently, the dam only offers 63-year flood protection. County of Sacramento, Planning and Community Development Department, SAFETY ELEMENT OF THE COUNTY OF SACRAMENTO, GENERAL PLAN (1993).

¹⁹⁰ As of the 2000 census, the median income of Del Paso Heights residents was \$31,290, which was approximately one third of the median income for Sacramento County (\$46,106). 2000 Census.

¹⁹¹ MCDC Demographic Profile 1, 2000 Census.

Private property owners are likely to bear the brunt of such a disaster since California heavily relies on an imperfect flood insurance system for post-disaster support. California mandates flood insurance coverage for all residents not to have one-hundred year flood protection.¹⁹² However, many property owners who are in fact susceptible to flooding might not even own flood insurance since the FEMA maps that delineate which areas have one-hundred year flood protection can be inaccurate.¹⁹³ This lack of sufficient coverage compounded, with the potential for industry wide bankruptcy resulting from such an overwhelming disaster, creates a situation whereby property owners will have to look beyond flood insurance to other potential measures of compensation in order to rebuild their communities.

Like Louisiana, California might look to eminent domain principles in order to facilitate redevelopment of areas that suffer extensive damage, since repairing such areas might be beyond the financial capabilities of individual landowners. However, California legislation and case law does not specifically address how compensation will be measured in the event of a disaster. As such, victims may rely on alternative measures of compensation, other than insurance, to provide additional recovery that complements compensation for eminent domain. Finally, an awareness of California's existing framework for pre-disaster mitigation strategies and post-disaster treatment of speculation is necessary to understand the full context of how eminent domain fits into the entire redevelopment process. This next section addresses the relevant California eminent domain compensation rules, pre-disaster mitigation strategies, legal treatment of speculation, and plausible alternatives in order to provide a full understanding of how California can utilize eminent domain to its advantage in order to facilitate the redevelopment of, Sacramento after extensive flooding.

¹⁹² Carrie Peyton Dahlberg *Behind the Levees, what's real risk? Floodplain Experts say Insurance Rules Map and Unverified Safety Zone*, Sacramento Bee, January 23, 2006, page A1.

¹⁹³ *Id.*

2. What are the underlying legal principles for “just compensation” in California?

➤ *California awards “just compensation” based on the fair market value of the property in its highest and best use.*

The California Constitution provides that “private property may be taken or damaged for public use only when just compensation [has] first been paid to [...] the owner.”¹⁹⁴ Whether the government exercises eminent domain to redevelop a devastated area or property owners seek compensation through inverse condemnation,¹⁹⁵ the compensation regime is the same.¹⁹⁶ Compensation is generally measured as the fair market value of the property taken.¹⁹⁷ If the landowner contests to the government’s offer, the parties will litigate over compensation. Generally, each party is responsible for their own litigation fees in such a proceeding;¹⁹⁸ however, this presumption can be overcome if the condemning party proposes an extremely low offer for the land, thus exacerbating the litigation proceeding, when the landowner himself is being reasonable.¹⁹⁹ Finally, unless otherwise waived, compensation is a question for the jury.²⁰⁰

Fair market value is based on the highest and best use of the property, instead of on the actual use of the property.²⁰¹ In determining the highest and best use of the land, the courts consider geography²⁰² reasonable zone changes,²⁰³ character and development trends within a neighborhood,²⁰⁴ and imminent changes in demand.²⁰⁵ Even if a community is saved after a levee breach, the government may rezone the area to avoid pressing their luck at a repeat

¹⁹⁴ CAL. CONST. art. I, §19.

¹⁹⁵ *E.g. Paterno v. California*, 113 Cal. App. 4th 998 (2003).

¹⁹⁶ *Federal Oil Co. v. City of Culver City*, 179 Cal. App. 2d 93, 97 (1960).

¹⁹⁷ Cal. Code Civ. Proc. § 1263.310 (2006).

¹⁹⁸ *County of Los Angeles v. Ortiz*, 6 Cal. 3d 141, 145 (1971).

¹⁹⁹ Cal. Code Civ. Proc. § 1250.410(b) (2006).

²⁰⁰ CAL. CONST. art. I, §19.

²⁰¹ Cal. Code Civ. Proc. § 1263.320(a) (2006).

²⁰² *Hayward Union High School District v. Lemos*, 187 Cal. App. 2d 348 (1960).

²⁰³ *People v. Donovan*, 57 Cal. 2d 346 (1962).

²⁰⁴ *People v. Los Angeles*, 220 Cal. App. 2d 345 (1963).

²⁰⁵ *People v. Ocean Shore R.R.*, 32 Cal. 2d 406 (1948); *City of Stockton v. Vote*, 76 Cal. App. 369 (1926); *Santa Clara v. Ogata*, 240 Cal. App. 2d 262 (1966).

disaster. This potential down-zoning as a wetland or farmland might be considered a regulatory taking,²⁰⁶ which is compensable based on the diminution in value of the property resulting from the governmental regulation.²⁰⁷ As a result, if a property owner can prove there was a regulatory taking, they can recover for the decrease in value of their property resulting from the zoning change. In effect, this allows the landowner to receive overall compensation for the condemnation as if the zoning change never happened. However, changes in demand of the land arising from increased awareness of flood risk and zoning change may ultimately be taken into account by the market and consequently affect the fair market value measurement.²⁰⁸

➤ *California employs a traditional fair market value measurement regime, which lacks a feasible way to measure the value of land ravaged after a disaster.*

The California Evidence Code allows the fair market value to be measured based on comparable sales,²⁰⁹ reproduction cost,²¹⁰ and capitalization of income, specifically for rental properties.²¹¹ However, in valuing residential property courts tend to favor the comparable sales approach.²¹² Under this approach, the property being compared “must be sufficiently alike in respect to character, size, situation, usability, and improvements.”²¹³ This approach is probably not feasible in the case of a flood where entire neighborhoods might be condemned and thus a sufficient comparison might not be available.

²⁰⁶ See *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (a land-use regulation that is imposed after a landowner acquires the property in question and that deprives an owner of all economically valuable uses results in a taking deserving of compensation). If land in question is rezoned as a wetland, all economically viable uses of such land will be lost. See *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (a land-use regulation that is imposed after a landowner acquires the property in question and that goes too far in diminishing the economic value of the property may be considered a taking deserving of compensation). If residential property is rezoned as farmland, it is likely that such property will diminish in value.

²⁰⁷ *Olson v. County of Shasta*, 5 Cal. App. 3d 336, 340 (1970).

²⁰⁸ See *Ocean Shore*, 33 Cal 2d 406; *Vote*, 76 Cal. App. 369; *Ogata*, 240 Cal. App. 2d 262.

²⁰⁹ Cal. Evid. Code § 823 (2006)

²¹⁰ Cal. Evid. Code § 820 (2006).

²¹¹ Cal. Evid. Code § 819 (2006).

²¹² COMPENSATION FOR EXPROPRIATION: A COMPARATIVE STUDY, v.2, at 219 (Gavin M. Erasmus ed., 1990).

²¹³ Cal. Evid. Code § 816 (2006); COMPENSATION FOR EXPROPRIATION, *supra* note 128, at 219.

California provides for alternatives to the comparable sales approach. The capitalization of income approach is generally applied to rental properties. Compensation under this method is based upon the present value of the net realizable lost income stream, which could potentially take into account the rental income forgone as a result of the flood.²¹⁴ However, the California court of appeals does not allow the “capitalization of the reasonable rental value attributable to planned or future improvements not in existence as of the date of value.”²¹⁵ Since the land being condemned for eminent domain would probably not be rentable due to the damage sustained by the flood, evidence of rental income from other buildings that are rentable would not be allowable.²¹⁶ As such, the income capitalization regime will not be a feasible measurement tool for eminent domain valuations after a flood in Sacramento.

The remaining method allowed by the California Evidence Code is the cost approach, which is the best approach to measure land improvements after a disaster. The value of the house in an undamaged state can be derived from the cost to rebuild the land improvements which is readily calculable on an itemized basis. Under the reproduction cost approach, compensation is based on the fair market value of the underlying land added to the cost of replacing or reproducing existing improvements²¹⁷, including buildings and other improvements, discounted by depreciation.²¹⁸ In ordinary eminent domain cases this approach is not favored due to difficulties in valuing the depreciation on structures and improvements. However, the value of environmentally impaired property is often calculated using this method since it

²¹⁴ Cal Evid. Code § 819 (2006); COMPENSATION FOR EXPROPRIATION, *supra* note 128 **Error! Bookmark not defined.**, at 219.

²¹⁵ *San Diego Metropolitan Transit Development Bd. V. Cushman*, 53 Cal. App. 4th 918, 929 (1997).

²¹⁶ *See id.*

²¹⁷ Improvements for purposes of eminent domain valuation include any machinery or equipment installed on the property that cannot be removed without substantial damage to the property. Cal. Civ. Code § 1263.205 (2006). Improvements for purposes of valuation in an eminent domain proceeding also include plants and trees existing on the land. *Los Angeles v. Hughes*, 202 Cal. 731, 737 (1927), overruled on other grounds *Los Angeles County v. Faus*, 48 Cal. 2d 672, 681 (1957).

²¹⁸ Cal. Evid. Code § 820 (2006); COMPENSATION FOR EXPROPRIATION, *supra* note 128, at 219.

provides a way to value the damaged land improvements by deducting the “cost of cure” from the hypothetical value of the undamaged property.²¹⁹ Based on a reproduction cost methodology, the value to repair the house back to its normal condition and the value of any improvements necessitated by future zoning laws that might be imposed in the event of a flood, including costs of putting houses on stilts, could be deducted from the hypothetical value of this house in an undamaged state.²²⁰ As such, reproduction cost provides a methodological approach to measure the value of flood damaged structures.

Measuring the “hypothetical” value of the land is more challenging since comparable sales will probably not be available in an event of a widespread flood and pre-existing values of the land will likely have changed as a result of changing public perceptions arising from increased awareness of flood risk. The court may be forced to look outside the California Evidence Code for an acceptable means of valuation of the land.

3. Does California provide a special regime for compensation in cases of eminent domain used for pre-disaster flood planning?

- *California provides for specific laws allowing improvements in the capability of disaster prevention infrastructure rather than for a specific regime of compensation to relocate landowners in anticipation of an impending disaster.*

California does not provide a specific framework for using eminent domain to remove property owners from land highly susceptible to natural disasters. If the state were to buy out property owners in anticipation of a disaster, they would follow the traditional eminent domain doctrines, including the compensation regime. However, the state would be hesitant to declare eminent domain as a pre-disaster planning measure due to the budget constraints compiled with the extraordinarily high value of land in California. This provides incentives for the state to adopt a wait and see approach in using eminent domain as a last resort.

²¹⁹ 8 Nichols on Eminent Domain (3d ed. 2002) § 14C,06(2)[a], p. 14C-57.

²²⁰ *See id.*

In a recent inverse condemnation suit, *Paterno v. State of California*,²²¹ in which plaintiff landowners asserted that a flood caused by the state's improper design and maintenance of a key levee resulted in a taking, the California supreme court recently awarded the landowners \$464 million dollars. In light of *Paterno*, governor Schwarzenegger applied a cost benefit analysis to determine if California should invest more money in land use planning rather than relying on a wait and see approach.²²² However, due to the high value of land in California, the state is more likely to provide local reclamation districts with the money to repair levees or invest further in flood control rather than declare eminent domain in vast areas to remove existing property owners. In fact, the California Water code provides specific provisions for the reclamation board to have the power to obtain any land necessary for state water and dam purposes through eminent domain.²²³

4. Does California provide special eminent domain compensation rules for disasters?

➤ *California does not have specific legislative or case law addressing how to calculate just compensation after a wide-spread disaster.*

Unlike France which specifically provides for compensation for property at risk of natural disasters through the “Barnier Law,”²²⁴ Like Louisiana, California does not have specific laws addressing what constitutes just compensation in the event of a natural disaster. The closest California comes to providing for precondemnation damages is for the compensation of diminution in value of a property resulting from an governmental announcement of its intent to condemn land for a parking lot prior to the eminent domain proceeding in *Klopping v. City of*

²²¹ *Paterno v. State of California*, 113 Cal. App. 4th 998 (2003).

²²² Schwarzenegger requested a bond to provide for levee repairs in light of *Paterno*. Even though the bond did not pass the bond request, it is a step towards more ex ante approach in Sacramento.

²²³ Cal. Wat. Code § 250 (2006).

²²⁴ See Code of the Environment, Art. L. 561-1.

Whittier.²²⁵ This decision was based on the premise that the government actually caused the diminution of value of the property before the actual day of the taking, the day of the eminent domain proceeding, and thus the property owner should not suffer for the government's mistake.²²⁶ California is even reluctant to provide such compensation as very few landowners have been successful in receiving precondemnation damages since courts have gone out of their way to justify precondemnation governmental actions since *Klopping*.²²⁷ Due to the marked difference between a natural disaster and governmental actions, California courts will probably even be more hesitant to provide for pre-disaster values of property.

➤ *The scope of alternative methods of valuation provided by California Civil Code has not been extended to evaluating just compensation for eminent domain redevelopment after disasters.*

Another method to increase compensation in the event of a taking is California Civil Code section 1263.320(b). This allows fair market value to be determined by “any method of valuation that is just and equitable” in situations where there is no relevant or comparable market. However, the California courts have generally limited the application of this provision to include special use properties including schools, churches, and cemeteries.²²⁸

²²⁵ *Klopping v. City of Whittier*, 8 Cal. 3d 39, 54 (1972).

²²⁶ *See id.*

²²⁷ COMPENSATION FOR EXPROPRIATION, *supra* note **Error! Bookmark not defined.**, at 226-227.

²²⁸ *See People ex rel. Dep't of Transo. v. S. Pac. Transp. Co.*, 84 Cal. App. 3d 315, 325 (1978).

5. How does California treat land speculation? At what time is the valuation taken?

➤ *The Date of Valuation in eminent domain proceedings is either the date of the precondemnation deposit, the date the complaint is filed, or the commencement of the trial.*

In eminent domain proceedings in California, property cannot be taken until just compensation is paid. Generally, the date the complaint is filed serves as the date of valuation;²²⁹ however, if due to the condemning agency's delay, if the issue of compensation is not commenced at trial within one year of the filing of the complaint, the date of valuation becomes the date of the commencement of the trial.²³⁰

The urgency of a condemnation resulting from a natural disaster like a flood would probably dictate in a "quick take" proceeding in which the condemning agency uses a deposit based on the probable compensation in order to obtain a prejudgment order for immediate possession.²³¹ In such a case, the date of the deposit, which often coincides with the date of the filing of the complaint, would serve as the date of valuation.²³² As the complexities of eminent domain cases may lead to extended periods of time between the filing of the complaint and the date the issue of compensation is tried, the deposit date becomes a useful tool for inhibiting further speculation by allowing for the earliest possible valuation date. However, determining a benchmark for probable compensation prior to trial might not be feasible due to the lack of legal guidance regarding compensation for properties ravaged by disasters. As time passes the original deposit might become inadequate as more information surrounding the final valuation arises. There is the danger that the condemning party might not make the necessary increases to

²²⁹ Cal. Code Civ. Proc. § 1263.120 (2006).

²³⁰ Cal. Code Civ. Proc. § 1263.120 (2006); Cal. Code Civ. Proc. § 1263.130 (2006); *see* Cal. Code Civ. Proc. § 1250.110 (2006).

²³¹ Cal. Code Civ. Proc. § 1255.410 (2006).

²³² Cal. Code Civ. Proc. § 1263.110 (2006).

the original deposit to keep with the expected final determination. If the original deposit is found to be inadequate, the time of the deposit cannot be used as the time of the valuation and the court may be forced to rely on a later date of valuation, resulting in even greater speculation.²³³

➤ *Property owners subject to eminent domain after a wide-spread flood in Sacramento would be susceptible to negative land speculation in determining just compensation.*

The more time that passes between the natural disaster and the date of valuation, the more time there is for real estate speculation that might affect the fair market value of the land. As noted earlier, when the government acts unreasonably and announces plans to condemn land before the filing of condemnation proceedings and consequently negatively affects the value of the property, the landowner may collect for the diminution of value based on the government's action.²³⁴ However, courts historically have been reluctant to apply the *Klopping* standard by making it difficult to prove that the government's actions were unreasonable.²³⁵ Especially in cases of disaster, it might be difficult to separate speculation arising from the flood itself from speculation arising from improper governmental action. As such, property owners in Sacramento could be left very vulnerable to the negative effects of speculation in the event of a flood. In such a case, the condemning agency could benefit in obtaining property at below-average prices at the expense of the current property owners.

➤ *Most property owners subject to eminent domain after a wide-spread flood in Sacramento would not be able to benefit from positive land speculation in determinations of just compensation.*

Increases in the value of land attributable to proposed projects for redevelopment, resulting in positive speculation, will probably not be awarded to property owners devastated by a flood. Such increases result from proposed developments actually increasing the values of

²³³ Cal. Code Civ. Proc. § 1263.110(b) (2006).

²³⁴ See *Klopping*, 8 Cal. 3d at 54.

²³⁵ See COMPENSATION FOR EXPROPRIATION; *supra* note 128, at 226-227.

surrounding areas, such as the effect that a proposed park or reservoir can have on the demand for neighboring property.

In *Merced Irrigation District v. Woolstenhulme* the supreme court of California limited the scope of when property owners can benefit from such positive speculation.²³⁶ In *Woolstenhulme*, the proposed expansion of a reservoir actually increased the value of a rancher's property since residential development of the area could follow the new beach front property.²³⁷ The case hinged the fact that at the time the project was first announced a reasonable person would not have been aware that the rancher's property was part of the proposed condemnation proceedings.²³⁸ The circumstances of *Woolstenhulme* would likely be distinguishable from the aftermath of a flood. In the case of a wide-spread flood in Sacramento, the area subject to redevelopment through eminent domain will most likely be evident based on the severe degree of blight in the neighborhood. Under these circumstances, compensation should not reflect the resulting increases in the value of the property arising from the speculation.²³⁹ As such, most property owners affected by an eminent domain proceeding to redevelop an area after a wide-spread flood in Sacramento would not be able to benefit from positive speculation.

6. Are there alternative mechanisms for property owners to receive fair compensation in California?

➤ *California provides for relocation assistance supplemental to takings compensation regimes.*

Under the California Relocation Assistance Law (CRAL), property owners are eligible for relocation assistance when there is a "causal connection between the acquisition by the public

²³⁶ *Merced Irrigation District v. Woolstenhulme*, 4 Cal. 3d 478, 499 (1971).

²³⁷ *Id.* at 484-485.

²³⁸ *Id.* at 499.

²³⁹ *See id.* 492.

entity and the displacement.”²⁴⁰ Such assistance will certainly be available when the government condemns land for redevelopment after a disaster, regardless of whether the landowner obtains compensation through eminent domain or inverse condemnation. However, the landowner must be displaced by the expropriating entity’s actions, meaning that a landowner who is awarded inverse condemnation compensation but whose house is not condemned will not be eligible for relocation assistance.²⁴¹

Relocation assistance can supplement compensation acquired from the taking. The public entity is required to assist the displaced person to find a satisfactory substitute to their old dwelling by providing information on availability, sales price, and comparability estimations.²⁴² If the displaced party finds a suitable replacement within a year of the official condemnation, generally the eminent domain proceedings, the landowner is entitled to compensation for the amount that the replacement cost exceeds the compensation they received from the taking itself, expenses arising from increased interest costs used to secure a new mortgage, and reasonable expenses incurred in closing costs on the new dwelling.²⁴³ However, this payment is capped out at \$22,500 dollars.²⁴⁴ If the displaced person is not able to obtain suitable replacement housing within a year of the official condemnation, the person is still entitled to the “additional amount [...] necessary to enable the person to rent a comparable replacement dwelling” for a maximum period of 42 months.²⁴⁵ This payment is capped out at \$5,250 dollars.²⁴⁶

➤ *California flood victims that successfully assert inverse condemnation receive the “diminution in value of their property” based on the pre-disaster value of their property.*

²⁴⁰ *Peter Kiewit Sons’ Co. v. Richmond Redevelopment Agency*, 178 Cal. App. 3d 435, 223 Cal. Rptr 728 (1978); Cal. Govt. Code § 7260 (2006).

²⁴¹ *Kong v. City of Hawaiian Gardens Redevelopment Agency*, 101 Cal. App. 4th 1317, 1326 (2002); Cal. Govt. Code § 7260.

²⁴² Cal. Govt. Code § 7261 (2006).

²⁴³ Cal. Govt. Code § 7263 (2006).

²⁴⁴ *Id.*

²⁴⁵ Cal. Govt. Code § 7264 (2006).

²⁴⁶ *Id.*

The most generous compensation regime for a victim of flooding in Sacramento would be through inverse condemnation. This doctrine was used in the *Paterno* case to award landowners \$454 million dollars in damages. If a court holds that the government took a landowner's land through inverse condemnation, the property owner may recover diminution in value, the decrease in the fair market value of their property due to the flood.²⁴⁷ In order to calculate diminution in value, the court compares pre-disaster value to the post-disaster property assessor value. Such a post-disaster valuation suffers from the same shortfalls arising from the limited measurement options available in eminent domain proceedings.

The diminution of value standard differs from a strict replacement cost regime in that replacement cost concerns how much it might cost to install new walls whereas the diminution in value would reflect the decrease in the market value of the property arising from the mold damage to the walls. This is because diminution in value takes into account prior depreciation. However, winning diminution in value is more favorable to the property owner since if the government condemns the land for redevelopment the property owner will be awarded the full value of their property before the flood, net of depreciation. On the other hand, if the property owner could not successfully assert inverse condemnation in this situation, they would be subject to the eminent domain compensation regime which will provide for the fair market value of the house after the flood. As such, inverse condemnation is a tool that property owners should utilize in order to obtain better compensation whenever possible.

The catch to inverse condemnation is that it is only evocable when a governmentally planned, constructed, or maintained project exposes property owners to an unreasonable risk of harm.²⁴⁸ In order to evade the scope of the Tort Claims Act, which would bar federal liability, a

²⁴⁷ *Olsen*, 5 Cal. App. 3d 340.

²⁴⁸ *Belair v. Riverside County Flood Control*, 47 Cal. 3d 550, 565 (1988).

landowner must claim that the damages incurred were caused by dangers created as a result of the deliberate planning, alteration, or upkeep in the functioning of the levee or dam rather than simply caused by routine maintenance negligence. A second roadblock for property owners who wish to invoke inverse condemnation in Sacramento will be proving that a taking actually exists. For property owners to establish a taking they must prove that their land is either permanently flooded or subject to “frequent and inevitably recurring overflows.”²⁴⁹ The final barrier is a constitutional balancing test that considers whether the damages that the property owner faces are more than his fair share of the cost of the public undertaking.²⁵⁰ As such, it will not be easy for a property owner to win on a theory of inverse condemnation, but it will be well worth their effort if they can secure the “diminution of value” of their property.

²⁴⁹ *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 181 (1871).

²⁵⁰ The constitutional balancing test applied in *Locklin v. City of Lafayette*, 7 Cal.4th 327, 368 – 369 (1994), was based on *Inverse Condemnation: Unintended Physical Damage* (Jan. 1969) 20 *Hastings L.J.* 431. Factors to be considered are as follows:

1. The overall public purpose being served by the improvement project;
2. The degree to which plaintiff’s loss is offset by reciprocal benefits;
3. The availability to the public entity of feasible alternatives with lower risks;
4. The severity of the plaintiff’s damages in relation to the risk bearing capabilities;
5. The extent to which damage of the kind plaintiff sustained is generally considered as a normal risk of land ownership; and
6. The degree to which similar damage is distributed at large over other beneficiaries of the project or is peculiar only to plaintiff.

COMPARISON:

LESSONS FROM LOUISIANA, FRANCE, & CALIFORNIA

1. Comparison of the Underlying Legal Framework of “Just Compensation”

- *France and Louisiana use comparable sales as a baseline for compensation but can rely on relocation costs. California has a stricter standard that is more tied to the use of comparable sales.*

Louisiana, California, and France all use FMV to determine compensation, with comparable sales being the preferred method in all three places. The key difference is that in France eminent domain compensation is handled exclusively by a specific eminent domain court²⁵¹; whereas in Louisiana and California, eminent domain falls under the province of the general civil court system. In Louisiana, the judge resolves the issue of compensation unless the landowner elects a jury decision²⁵²; conversely, in California the question of compensation defaults to a jury unless the landowners opts for a judge’s determination.²⁵³ In France, the eminent domain judge leads the inquiry into comparable sales, relying on a state appraiser’s estimation based on a recent market transaction. In the adversarial American legal system both sides present testimonial expert witness valuation evidence primarily based on comparable sales, but inclusive of other allowable valuation techniques.

France and Louisiana are similar in the relatively generous scope of their mandates for compensation, with the code in France compensating for the “totality of the harm”²⁵⁴, and Louisiana providing for the “full extent of his loss.”²⁵⁵ California relies on the American Constitutional standard of “just compensation,” which is primarily focused on the FMV of the

²⁵¹ Ordonnance of October 23, 1958.

²⁵² La. Const. art. I, § 4 (1974).

²⁵³ Liz I can’t find jury standards in your section.

²⁵⁴ Article L. 13-13 of the Code of Expropriation.

²⁵⁵ La. Const. art. I, § 4 (1974).

property at the time of valuation.²⁵⁶ The more expansive definitions of compensation in France and Louisiana allow judges to utilize alternative measurement methods beyond FMV, particularly when the favored comparable sales approach does not yield an accurate estimation of value. Thus in France, comparable sales are inapplicable if they do not reflect the “uniqueness” of a property and replacement costs will be used instead.²⁵⁷ In Louisiana, if comparable sales will under-compensate the landowner, methods that will make an owner “whole”, including replacement costs, will be applied.²⁵⁸ California, on the other hand, is generally bound to FMV determinations of the property, with the limited exception historically applied to “special use” properties. Not only does California disallow using replacement cost in determining fair market value, California’s “highest and best use” provision subjects the FMV computation to decline further if a property owner cannot successfully assert a regulatory taking in the event of the down-zoning of an area.²⁵⁹

All systems have the potential to award attorney fees. In France, attorney’s fees can be included as part of ancillary compensation. In awarding ancillary compensation the eminent domain judge makes an approximation of costs normally associated with the purchase of a property. In most cases, ancillary compensation can range from 15 to 20% of the primary compensation. Attorney fees can be part of this ancillary compensation.²⁶⁰ In Louisiana and California, generally each side is responsible for covering their attorney fees. However, in Louisiana, the trial court has discretion to award attorney fees and expert witness fees.²⁶¹ In

²⁵⁶ *Cal. Code Civ. Proc.* §1263.310

²⁵⁷ Cass. Civ. III 6 March 1984, *Société d’Equipement de la region de Lyon*, n. 83 7005. CA Versailles, 12 January 1982 *Consorts Wautier*, JCP 1982, Ed. G IV 260.

²⁵⁸ Constant, at 707.

²⁵⁹ *Cal. Code Civ. Proc.* §1263.320(a)

²⁶⁰ Code Expr. Art. L.13-12.

²⁶¹ See e.g., Hecker at 130.

California attorney fees may only be awarded if the condemning party proposes an extremely low purchase offer, which would tend to exacerbate the litigation process.

➤ *Legislature's response to the compensation trends of the courts*

French legislatures are aware of the potential for overcompensation of landowners stemming from the judicial discretion and deference in determining compensation. In responding to this problem French legislatures have strengthened the role of the state assessor in determining compensation.²⁶² In contrast, the 1974 Louisiana legislature with Article I section 4 responded to the perception of under-compensation by giving judges and jury a landowner-specific “full extent of his loss” goal.²⁶³ On the other end of the spectrum, California strictly limits compensation for eminent domain actions to fair market value regime that would tend to under-compensate landowners following a disaster.²⁶⁴ However, California responds to the potential for under-compensation by relying more heavily on alternatives such as relocation costs and inverse condemnation.

2. Comparison Pre-Disaster Mitigation Techniques

➤ *France provides a specific framework that facilitates prompt pre-disaster intervention. The lack of a specialized system in California and Louisiana can hinder the adoption of disaster prevention measures.*

While France specifically provides a framework to remove and compensate residents from extremely disaster prone areas through the *Barnier law*,²⁶⁵ Louisiana and California simply rely on the general eminent domain and police power frameworks in order to achieve the same ends. By relying on a general framework not tailored to a specific disaster scenario, the eminent domain proceedings would take considerable time and resources, allowing for the debate of the

²⁶² C. expr., art. R. 13-29.

²⁶³ La. Const. art. I, § 4 (1974).

²⁶⁴ Cal. Evid. Code Section 823

²⁶⁵ See Code of the Environment, Art. L. 561-1.

“takings” issue rather than just the compensation issue. This could result in a considerable delay to taking the necessary preventative measures, which may cost Louisiana and California more money and lives than necessary.

Unlike France, the United States does not have a statutory obligation to intervene before a disaster occurs, but municipalities may still be liable for inadequate protection. On the other hand, once the French equivalent of FEMA (the Ministry of Major Risks, Civil Security, and the Economy) identifies an area as highly sensitive to a flood disaster, the French head of state has no other choice but to employ necessary preventative measures.²⁶⁶ As a result, the French system ensures more consistent protection in flood prone areas; whereas the United States may allow some areas to remain unprotected.

➤ *In considering available pre-disaster mitigation techniques, the United States has the discretion to limit analysis to infrastructure improvements; whereas, France may also consider changes in land use.*

After the Ministry of Major Risks, Civil Security, and the Economy determines that a preventative measure needs to be implemented, France adopts a cost-benefit analysis in which they weigh the available preventative measures against each other.²⁶⁷ Under this analysis, the French government weighs the cost of taking the land as a preventative measure against the probable costs of other preventative measures, including improvements to infrastructure.²⁶⁸ In contrast to the French code, neither Louisiana nor California systematically finance the option of buying out development at risk of flooding. Thus removing people from disaster prone areas may conflict with private property rights or might be designated as a solution of last resort. This results in Louisiana and California’s frequent deference to less invasive infrastructure

²⁶⁶ See Mesures de sauvegarde des populations menaces par certains risques naturels majeurs, decret no 95-1115 of October 17, 1995, *Journal Officiel*, October 19, 1995, p. 15256

²⁶⁷ See Code of the Environment, Art. L. 561-1.

²⁶⁸ See *id.*

improvements. However, investing in flood control is also critical to protecting private property, and without set guidelines on what solutions need to be compared in a cost benefit analysis, Louisiana and California risk missing the most cost efficient solution.

➤ *Taking shortcuts can be costly in the long term.*

In light of the costly price-tag of *Paterno* in California and of Hurricane Katrina in Louisiana, the government should be reconsidering whether they need to adopt a system that allows for the consideration of aggressive measures to mitigate damages caused by flooding. However, these states do not seem to be learning their lesson. In wake of Hurricane Katrina, the local planning commission is considering redevelopment in the most devastated areas rather than dictating that such areas are unsuitable for residential development. In addition, Governor Schwarzenegger is lobbying the federal government for money to fix the levees while development in the secondary zone of the delta, an area even more flood prone than Sacramento, continues. As such, Louisiana and California continue to narrowly limit disaster prevention mechanisms to “bandaid” regimes by often excluding other more cost-effective solutions.

3. Comparison of Post-Disaster Specific Compensation Schemes Used for Eminent Domain

➤ *France provides compensation for pre-disaster values of property; whereas Louisiana and California limit compensation to the post-disaster value of the property.*

The French Barnier law specifically provides that flood ravaged properties subject to redevelopment will be compensated at pre-disaster values, much like the LRA proposal.²⁶⁹ On the other hand, Louisiana and California never specifically address compensation for property condemned by a natural disaster. In the event of a disaster, these systems will rely on the general rules of just compensation, which will limit the valuation of the property to the post disaster

²⁶⁹ Code of the Environment. Art. L. 561-1.

state.²⁷⁰ As such, the property owner would tend to shoulder any damages caused by the flood, unless they can successfully collect under inverse condemnation.

The French compensation scheme tends to disincentivize property owners from internalizing the cost of living in a flood prone area. Instead, the cost is distributed among all insurance payers,²⁷¹ making the French system similar to a mandatory flood insurance system where all citizens bear the costs of disaster recovery rather those who choose to live in disaster prone areas like a flood plain. In addition, residents are more likely to move back to flood prone areas, creating a cyclical framework of redevelopment followed by another flood. However, the Barnier law also provides a system for the government to easily seize land that is subject to frequent floods and forces municipalities to compensate property owners for the decision to allow development in a flood plain, which helps to break the cycle.

The laws of Louisiana and California seem to punish those who choose to live in flood plains through limiting compensation arising from eminent domain proceedings. Such limits on compensation force landowners to internalize the risk of floods, thereby disincentivizing living in flood prone areas. However, this model depends on the assumption that residents are aware of their flood risk when they choose to live in a flood plain. In fact, this presumption may not be entirely true as residents often learn of flood risk after the purchase of a home, when it becomes necessary to buy flood insurance. As this requirement is often dictated according to FEMA maps, which can be inaccurate or outdated, many landowners may not be aware of the risk. In

²⁷⁰ The earliest date of valuation in an eminent domain proceeding would be the date the complaint is filed. For California *see* Cal. Code Civ. Proc. § 1263.120 (2006); see also the discussion on Louisiana for parallel statutes. As the day the complaint is filed is inherently after the disaster, the valuations of the land would be based upon the post disaster state of the world.

²⁷¹ All French residents, even renters, are required to pay water insurance, which generally pertains to water damage but also covers flood insurance. Flood Plain Management and Mitigation in France, Vincent R. Parisi, International Committee Chair of Association of State Floodplain managers in FEMA region 5, based on conference March 7-8 2002, p. 3

addition, the public emphasis on flood control infrastructure may give residents a false sense of security and may discourage individual initiative to understand actual flood risk.

4. Comparison of Redevelopment Speculation Controls

In New Orleans, speculators are aggressively canvassing property owners through electronic bulletin boards like Craig's List, online forms for real estate investment, and old-fashioned "We buy houses, cash!" signs. Residential properties attract the most interest.²⁷² According to the Housing Affordability Initiative of MIT, the speculative interest in New Orleans is unprecedented, exceeding purchases in the wake of both the 9/11 disasters and disasters like Hurricane Hugo.²⁷³ In those disasters, fearful or cash-strapped property owners were willing to sell at inordinately low prices. Cash-rich investors profited, able to wait patiently for government funds to redevelop the city.

The three regions in this paper address this concern to varying degrees through timing provisions or shifting burdens of proof. France has the strongest legal measures against speculative purchases. California provisions, on the other hand, may perversely incentivize speculative behavior. Rules specific to flood-prone or disaster-stricken properties are rare in both American jurisdictions. Finally, Louisiana's approach to speculation focuses on reigning in speculation valuations that adopt the highest and best use approach.

➤ *Timing Gymnastics Critical to Controlling Speculation: Later Valuations Reward Speculative Purchases, Earlier Valuations Punish Speculative Purchases.*

In both California and Louisiana, the timing of the valuation is narrowly defined in comparison to the French standard. Both states require that property be valued, at the earliest, on the date on which the complaint was filed. At the latest, the property could be valued at the time

²⁷² "Speculation interest in New Orleans," *Boston Globe*, September 6, 2005.

²⁷³ *Id.*

of the trial.²⁷⁴ The choice of dates depends largely on the public purchaser and whether they chose to make a pretrial deposit of the fair market value of the land.²⁷⁵

The timing of this valuation lags far behind the actual public announcement of the proposed perimeter concerned by eminent domain. For disaster victims, this timing may make them particularly susceptible to efforts by aggressive “cash fast and on the spot” speculators.

To illustrate this point, consider a situation where the government announces their intention to initiate an eminent domain inquiry in a lower-income, disaster-ravaged area. Homeowners, fearful of government power and excessively low compensation, may sell to investors who may, in turn, resell the property to the government, making a profit. If property values increase due to speculation concerning the government project, the investor benefits under both California and Louisiana law but not under French law. If property values decrease, the speculator may still benefit from a fair market valuation standard.

France’s unique two-pronged timing scheme is particularly strong in discouraging speculation. Property may be valued either at the time of the judgment or at any time after the eminent domain study proceeding is announced.²⁷⁶ Furthermore, courts may also choose, based on timing, the set of background property rules that should be included to appraise the property value.²⁷⁷

In contrast, California seems to adopt a standard which places an additional burden on the public purchaser to exercise vigilance towards speculators, instead of discouraging speculators directly. Following both the Klopping standard and the Merced decision, if the public purchaser prematurely announces eminent domain or incorrectly draws the eminent domain boundaries, the

²⁷⁴ Cal. Code Civ. Proc. § 1263.120 (2006)

²⁷⁵ Cal. Code Civ. Proc. § 1255.410 (2006)

²⁷⁶ Expropriation Code, Art. L. 13-15.

²⁷⁷ *Id.*

property owner is entitled to compensation that includes any speculative increase or that offsets price decreases.

- *Judicial controls like a rebuttable presumption of speculation or shifting the burden of proof to the defendant may also disincentivize speculative behavior.*

In Louisiana, property owners that demand valuations based on a highest and best use standard assume the burden of proof. The French Code, on the other hand, adopts a rebuttable presumption of fraud and speculation based on the timing of the property owner's actions. Repairs and improvements after the announcement of a potential eminent domain proceeding immediately assume this presumption.²⁷⁸ More importantly, for properties acquired in flood prone areas, there is an automatic presumption of fraud if acquired after the announcement of an eminent domain procedure.²⁷⁹

5. Comparison of Available Alternatives to Eminent Domain (Excluding Flood Insurance)

- *France's Barnier law minimizes any need for an alternative system, whereas the lack of pre-disaster compensation plan necessitates an ad-hoc entity like the LRA. Inverse condemnation in California can be used as a relatively small-scale compensation alternative.*

The French model of ex-ante planning for disasters runs counter to the American method of ex-post recovery. The American disaster response heavily focuses on funding from FEMA, which results in a vacuum of law specifically addressing alternative methods of relief. Instead, when FEMA failed after Hurricane Katrina, New Orleans spiraled into chaos as policy makers frantically proposed alternative compensation solutions with the LRA emerging as the primary plan.²⁸⁰ The French Barnier law, which mandates a flood disaster prevention fund, minimizes the need in France for an ex facto compensation scheme like the LRA.²⁸¹ Although California

²⁷⁸ Expropriation Code, Art. L. 13-14.

²⁷⁹ Code of the Environment, Art. L. 561-5.

²⁸⁰ Louisiana Recovery Authority *The Road Home Housing Programs*, 7 Mar. 5, 2006.

²⁸¹ Expropriation Code, Art. L. 15-6 to L. 15-9.

has enacted a generous relocation cost compensation package²⁸², this pales in comparison to France's "pre-disaster" compensation scheme. As such, both Louisiana and California are forced to look into an abyss of alternative compensation mechanisms when faced with a sizable flood.

In the aftermath of severe flooding, California residents will likely use inverse condemnation and relocation cost reimbursement as a crutch for increasing compensation. However, since the availability of inverse condemnation so heavily depends on government's involvement in the planning, construction, or maintenance of the failed flood control devices, such an option will not be available to all injured property owners, who will likely fall-back on relocation costs. In contrast, residents of New Orleans will have an even more difficult time invoking inverse condemnation since their claim will involve the Federal Government, who was responsible for maintaining the levees that failed after Hurricane Katrina through the Army Corps of Engineers. Although the Army Corps of Engineers has admitted fault in the maintenance of the levees, the stigma of the Federal Tort Claims Act might overshadow this and prevent any successful inverse condemnation claim in New Orleans. In addition, to be compensated by the LRA in New Orleans, one has to drop all lawsuits for compensation. As such, the scale of private inverse condemnation suits in New Orleans will be minimal compared to amount filed in California.

²⁸² Cal Govt. Code § 7260..

PRESCRIPTION

NEW ORLEANS:

As the state-entity entrusted with distributing federal CDBG funds to individual homeowners, the LRA has a mandate that stems from a moral and political obligation for the government to compensate for the damaged homes that it was significantly at fault for rendering unusable. In France, the Barnier law automatically provides for full compensation without moral pressure. Although Louisiana does not automatically provide a framework for full compensation, the underlying fairness principles reflected in the eminent domain compensation laws of Louisiana provide moral foundation that can be applied to the LRA model.

In Louisiana the constitutional standard of “full compensation” for a homeowner’s loss allows at a minimum an awarding of FMV as determined by comparable sales. As such, the LRA’s “pre-storm value” should reflect recent pre-Katrina market transactions within a comparable vicinity, and relative to a comparable home’s condition and size. However, full compensation may encourage speculative behavior. A flexible judicial standard, similar to France, on the timing of the valuation would be helpful in disaster prone areas to control against speculation.

Due to the scope of the housing demand, the financial and temporal constraints on the LRA, and the lack of homeowner input regarding individual compensation determinations a downward pressure on pre-storm value is likely to exist. The LRA can better approach “full compensation” and counteract this downward pressure by analogizing the adversarial process employed by the Louisiana courts in standard determinations of FMV by comparable sales. The LRA should establish an arm that serves as a proxy for homeowner’s collective interest. This

arm should be entrusted with creating a standard pre-storm value based on the factors of comparable sales. However, if this valuation approach is found to under-compensate due to problems with home comparison, the homeowner's proxy within the LRA should effectuate the goal of "full extent of his loss" and present evidence of homeowner's losses that can serve as an upward pressure on pre-storm value.

WHAT NEXT? SACRAMENTO SHOULD APPLY THE LESSONS OF HURRICANE KATRINA

As Hurricane Katrina will surely not be the last flooding disaster in the United States, susceptible areas such as Sacramento need to start preparing their legal framework now in order to avoid the chaotic political frenzy surrounding compensation and redevelopment that has plagued New Orleans. Should California adopt a model similar to the LRA? Or should California build on their own takings compensation principles to shape their redevelopment and compensation plan?

In general, adopting a full compensation model, similar to the LRA, without simultaneously employing supplemental preventative measures, such as stronger pre-disaster land use controls, is foolish. There needs to be a disincentive for landowners to avoid living in flood-prone areas, either through strong pre-disaster land use controls or through an unforgiving compensation scheme. Otherwise a cyclical framework, whereby a disaster is repeatedly followed by redevelopment, can emerge. However, this model assumes property owners are aware of the risks they face. In New Orleans many residents probably were not aware of the magnitude of the flood risk they faced until after Hurricane Katrina. Fairness dictates that New Orleans residents should be given their one pardon. However, in light of the media frenzy surrounding Hurricane Katrina, residents of Sacramento are now aware of the flood risk they

face. Based on such heightened awareness, fairness would probably not dictate the same result if Sacramento were to flood.

California now has the choice whether to employ the restrictive yet generous French model or to keep to their existing model. In a state that is already plagued by an immense housing crisis and faces numerous types of devastating natural disasters such as earthquakes, mudslides, flooding, and wild-fires, adopting the French model might subject the state to unprecedented liability during an existing fiscal crisis. Evenmore, heightened restrictions on land-use will further exacerbate the affordable housing crisis in California by imposing an even greater housing shortage. In light of the increased awareness of risk, the current California regime, which measures compensation on post-disaster house values, yields the proper incentive for market forces to prevent people from living in disaster ravaged areas. However, in order to not further punish affected landowners, there must be an array of reasonable housing choices after the disaster. As such, California should focus on laws that curb post-disaster speculation by adopting a model that allows greater flexibility in the timing of the valuation, similar to the French model.

Hurricane Katrina led to an unprecedented situation whereby American moral's compel a fairness driven compensation regime. Next time, America might not be so emphatic towards people that choose to live in disaster prone areas. California needs to address their disaster redevelopment laws now in order to avoid the prolonged chaos of Hurricane Katrina