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Introduction

In 2004, the Federal Emergency Management Agency (FEMA) “war gamed” a Category 5 hurricane hitting New Orleans. After Katrina hit the Gulf Coast in August 2005, FEMA estimated that as many as one million people were displaced and 450,000 families were left homeless. While those numbers are regularly modified, the reality is that the numbers of displaced and homeless people exceed the government’s “nightmare scenarios” and have left a daunting challenge to the government, private sector and stakeholders; how to house all the people.

It is a particularly difficult challenge in the face of America’s long tradition of inadequately housing its citizens, particularly those who are poor, elderly, or suffer with mental or physical disabilities. The task is compounded by the aftermath of the Katrina disaster because the storm devastated some of the poorest regions of the country, thus exacerbating the need for affordable and low income housing at a time when there was already increased need and decreased supply of such housing across America. According to the Fannie Mae Foundation, the pre-Katrina lack of affordable housing is so widespread that there is not a single housing market in the United States where a household earning today’s minimum wage can reasonably afford a modest two-bedroom rental. The report additionally found that the poor and elderly often reside in overcrowded or dilapidated housing or are spending a very large percentage of their income on shelter, placing rent in competition with other essentials, like food or health care.

For many of these Americans, government housing assistance has been a necessary part of their existence. However, in public housing agencies across the country the need is woefully unfulfilled. Most authorities have long waiting lists of people who are seeking government housing assistance. Many of the areas hardest hit by the storm have high populations of poor, elderly and ill. In New Orleans, Louisiana, 37.3% of its population lived in concentrated poverty neighborhoods and the average household income for blacks in the city was $21,461 and $40,390 for whites. The median household income in New Orleans was $31,369. New Orleans, along with Mobile, Alabama; Birmingham, Alabama; and Biloxi, Mississippi, was one of the poorest American cities at the time Katrina hit.

In other words, the regions hardest hit by Katrina were already suffering significant housing shortages coupled with limited capital to sustain a good quality of life. Losing what little they had significantly impacts the need for affordable housing, the need for government housing assistance, and the urgency of that assistance.

This paper attempts to address the housing crisis that faces the Gulf Coast and its citizens and provide recommendations for solving the problem. This author has found no quick or easy answer but addresses the problem in stages. First, I consider the
breadth of the affordable housing problem that is trying to be resolved. Second, I consider alternative resolutions. Third, I *329 identify the players and their roles in effecting resolution and fourth, I conclude.

I. The Affordable Housing Problem

The Department of Housing and Urban Development (HUD) defines affordability as housing that would require a “household to pay no more than 30% of its family income for housing. Families who pay more than 30% of their income for housing are considered cost burdened and may have difficulty affording necessities such as food, clothing, transportation and medical care.”9 Across America, more than 13.7 million households pay more than 50% of their annual incomes for housing.10 In the Gulf Coast regions the numbers are more staggering. In 2000, a third of New Orleans’s population paid 35% or more of their annual incomes for housing, 14% of Biloxi’s population, 16.7% of Mobile’s population, and more than 20% of Birmingham’s population was similarly situated.11

Before Katrina, blacks who left New Orleans moved to Atlanta, Baton Rouge, Dallas, Houston, Lafayette and Los Angeles in that order. Whites moved to Baton Rouge, Houston, Biloxi, Dallas, Lafayette, and Houma, Louisiana in that order. Ninety percent of the total number of evacuees are living in ten American states. Those states are Alabama, Arkansas, California, Florida, Georgia, Louisiana, Mississippi, Nevada, Tennessee and Texas. Most of the evacuees are in Louisiana and Texas although there are some in all of the fifty states. Some of the highest concentrations of people are in Houston, Texas (100,000) and Atlanta, Georgia (44,000).12 The economic impact on those areas has not been quantified but is significant. For *330 example, almost 15% of the people in New Orleans lived in poverty before Katrina.13 Moreover, 37.3% of New Orleans’s poor lived in concentrated poverty neighborhoods. These numbers reflect the need for additional government subsidized housing in the cities that are providing housing for the evacuees. For example, in Dallas alone, the Housing Authority has placed more than 300 families in public housing or provided section 8 vouchers. All of these families lived in public housing or received section 8 voucher assistance in their home communities. The placement of evacuee families in public housing has been the source of significant controversy because the evacuees were moved ahead of families that were already on public housing waiting lists for housing and/or housing vouchers. Dallas had a waiting list of 8,826 families; Fort Worth’s waiting list is 1,124 and Houston’s is 10,095 causing families already on the public housing and section 8 voucher waiting lists to wait for housing even longer.14

This need for affordable housing seems to conflict with the reality of America’s booming economy, lead by housing. For the first time in America’s history, over two-thirds of all families own their homes. But in the midst of this rising prosperity, families in the bottom quartile of the income distribution have seen their real income decline while rents have outpaced distribution.15 In addition, along with the rising prosperity has come rising home prices, decreasing homeownership affordability as well.

The current need for affordable housing in America is great. Between 2.5 and 3.5 million people are homeless at some point in a given year, and nearly 2 million households live in severely inadequate units.16 After Katrina, that need increased by about one-half million.17 One of the compelling questions that is asked is how can we expect to meet the additional need when *331 we have for so long been unable to meet the serious pre-Katrina need for affordable housing rental and homeownership units.

II. Affordable Housing Post Katrina

Current government policy has played a significant role in the availability of affordable housing. HUD has identified the expansion of the supply of affordable housing for low-income families to be at the core of its mission.18 To address the nationwide shortage of affordable housing, HUD administers various housing programs. Those programs include homeownership programs like the HOME Investments Program19, Self-Help Homeownership (SHOP)20, and the Homeownership Zone program.21 The HOME program is designed to expand the supply of decent, affordable housing for low- and very low-income families by giving grants to states and local governments. SHOP funds non-profit organizations to
purchase home sites and develop or improve the infrastructure needed to set the stage for sweat equity and volunteer-based homeownership programs for low-income families. The homeownership zone program allows communities to reclaim vacant and blighted properties, increase homeownership, and promote economic revitalization by creating entire neighborhoods of new, single-family homes, called Homeownership Zones. Adequate funding for these programs continues to be an issue.

III. Necessary Considerations for Repairing the Gulf Coast Region

To effectively provide quality housing for all Americans, many factors other than the house alone are important. However, for the purpose of this article, emphasis will be placed on the housing unit itself recognizing a longer term goal of erecting the unit in a sustainable community. These factors include adequate infrastructure, social amenities, transportation, social services, commercial and retail facilities and the like. Today, the need for the housing unit is an urgent one and deserves the most attention.

A. First things, First: Providing Economic Support Incentives for Rebuilding

Before new and replacement housing units can be built in New Orleans and other cities along the devastated Gulf Coast Region, one reality needs to be acknowledged America does not seem prepared in any way to re-create a destroyed city. But that is the primary task before the country today, as least as it relates to these hurricane-demolished regions. The City of New Orleans, for example, laid off most of its city workers, leaving it incapable of performing many of the basic municipal services needed to pave the way for the return of its citizens. Homeowners who can rehabilitate their homes first need to get a building permit issued by the City. Before the permit can be issued building inspectors must inspect the home to ensure that it is in a state strong enough to be rehabilitated. However, the city has far fewer building inspectors to perform such inspections today than it did before the hurricane hit.

Before the city can expect to be able to attract its citizens to return home, then, it will need to figure out how to operate again. It will need to find income. It will likely not be able to secure loans from the traditional lending and bond markets. Perhaps the city should seek non-conventional financing from other cities throughout the country, even those whose sole motivation would be in knowing that next time it could be them in need of help. Cities can lend money in amounts based on their size, wealth and other abilities. Alternatively, other municipalities can agree to lend their workers to the City of New Orleans to perform building inspections and the like for the city for specified periods of up to six months.

The federal government should provide emergency direct loans and grants to residents to help them rebuild blighted neighborhoods seriously impacted by the wake of Katrina. The government should also provide more FEMA assistance for emergency relief. Furthermore, federal contractors and engineers should be given incentives to participate in the redevelopment of New Orleans. Federal funding should also be given to help create more schools and public facilities to attract more displaced residents back to the city. Nevertheless, what we do should not be completed in a vacuum, it should not be done as if we have not learned lessons from past experiences and it should not be done so hastily that we fail to provide safe, decent and sanitary housing for the people we are trying to serve.

B. Lessons We Have Learned

Since at least 1934, America has attempted many things to attack the growing problem of adequate, safe, sanitary, decent housing for its people. While the problems have not been solved, many lessons have been learned. Some of those lessons will be important as the rush to provide housing for Katrina victims is on. A few are discussed in this section of the paper.

First, housing should not be built in a vacuum. Many considerations must be made to ensure that the house that is built will be part of a sustainable community. For example, we have learned that economic polarization often results in concentrated communities of poverty that negatively impacts the entire community. When coupled with a history of environmental
dumping in areas of highest poverty and/or racial composition, the disadvantages to the entire community mount. Economic support for maintaining quality housing requires innovations in lending, jobs creation and education, and stakeholders should be an essential part of the planning of the redevelopment of a community. All these lessons can be described by a single goal: Build Sustainable Communities.

A sustainable community is one generally defined as one that consciously decides what strategies it will use and implements those strategies to ensure a community that will persist over generations. Ideally, sustainable communities consider economic, environmental and social issues that impact its well-being. It fosters multi-stakeholder participation, rejects policies that waste and deplete natural resources or uses them in a deleterious way, and it encourages diverse incomes, ethnicities and racial development.22

C. The Environmental Challenge: Returning to New Orleans and the Gulf Coast

In 2004, The Yale School of Forestry and Environmental Studies reported:

*334 New Orleans has probably always seemed (to the outsider) to be both impossible and inevitable. New Orleans’ location in the highly productive but fragile deltaic plain of south Louisiana has proved to be of unparalleled strategic value throughout the city’s history, while at the same time defying human attempts to discipline the landscape. The following interrelated ecological factors affect the biophysical ecosystem of southern Louisiana: the Mississippi River trying to change course, land subsidence, coastal erosion, sea level rise, saltwater intrusion, a predicted increase in destruction from hurricanes, increased incidence and severity of flooding, and a spreading apoxic lesion in the Gulf of Mexico. Whether or not these factors can be treated is a question that will only be answered after billions of dollars are spent on restoration projects.23

Due to rapid wetland loss since the first half of the 20th century, New Orleans’ and southern Louisiana’s infrastructure and population are said to be more vulnerable to hurricane-related storm surges than they were less than 100 years ago. The scientific consensus is that every 2.7 miles of coastal marsh lost between solid land and open water add one foot to the height of a storm surge reaching solid land. Although hurricane levees brace the New Orleans metro area south of Lake Pontchatrain, the toss of wetlands means that storm surges are more likely, with the right hurricane, to overtop the levee system and fill up the bowl that is the city: once water fills the area within the levee system, it has nowhere to go. That localized torrential downpours, typical in summer, often overwhelm the city’s pumping system, stranding cars and flooding ground-floor rooms, makes this prospect all the more fearsome.24

From its beginning, New Orleans was a city developing in an area of marshes and swamps that challenged the imagination of builders, architects and engineers alike. The geological problems became exacerbated by the growth of the city in the wake of federal and local government policies that encouraged development in these areas.

The effects of the hurricane that plummeted the Gulf Coast in August, 2005 was clearly no surprise. The aftermath of that hurricane, Katrina, *335 including the broken levees, the flooding and the annihilation of whole communities were expected consequences of decades of environmental misbehavior and government neglect. Before the government tries to redevelopment seriously damaged and blighted communities, the levee conditions should be ameliorated and restored to withstand the effects of hurricanes that measure above category 3. Pierce Lewis referred to New Orleans as an inevitable city built in an impossible water-logged setting.25 Many New Orleans communities grew up from needs for jobs and housing at affordable prices.

Between the industries located nearby and the low cost of properties in the “danger zones” of the swamplands, it is evident why the development began there. But it was government policy that encouraged further development in these areas. Government policymakers (state, local and federal) decided where concentrations of low-income mega-complexes, and roads and in particular, federal highways like interstate highway 10 would be placed. They also designated and designed flood
control projects, creating systems that supported the degradation of the natural absorbency of the Mississippi Delta ecosystem. Finally, making federal flood insurance affordable and available also fed the drive to build larger and larger subdivisions in these de-watered danger zones, placing more and more American citizens at serious risk. A risk realized with Katrina and its aftermath. Therefore, before Americans can return to their homes along the Gulf Coast region, they should consider eco-friendly redevelopment designs or they will merely be re-creating another time bomb.

Planning the “new” New Orleans and Gulf Coast will take time, but with so many displaced families, time is at a premium. The affected areas need to look at short-term temporary housing as well as long-term permanent housing for its residents. The demand for housing units is immediate and as such presents a difficult challenge because one of the first things that must be planned for is the location of the development and redevelopment. Despite all the social reasons for rebuilding New Orleans and the Gulf Coast region in the same places as before Katrina, to do so would be to ignore the multitude of problems that contributed to Katrina’s devastation and to recreate the circumstances for a future disaster.

*336 D. Returning to New Orleans and the Gulf Coast Region: Success Through a Diversity Motivated Reconstruction Plan

Much has been said about the fear that the New Orleans that will be redeveloped will be decidedly different from the Pre-Katrina New Orleans. African Americans who predominated the pre-Katrina population and the poor expect to be excluded from the new New Orleans. That would be a mistake on several fronts, not the least of which are that these populations make up the historical fabric of the city and were the most reliable investors in the city’s sustenance pre-Katrina. Historically, New Orleans was racially and ethnically diverse. Until the 1960s and 1970s most parts of the city reported racial and economic segregation patterns that were among the smallest in America. While there was undoubtedly tension, black and white New Orleans residents enjoyed more racial harmony than discord.

This is not the New Orleans that the world saw on television after Katrina. By August, 2005, New Orleans communities were decidedly segregated along racial and economic lines. Instead, New Orleans had become a highly segregated community, with more than 75% of its population living in segregated communities. By the same token, African Americans were long rooted in their communities. In fact, in the Gulf Coast cities most devastated by Katrina, African Americans’ roots were strong. In New Orleans, 88% of the African Americans who lived there had been born in Louisiana; in Baton Rouge, 90% of the African American residents were born in Louisiana. Similarly, in Mobile and Birmingham, Alabama, African Americans born in the state was at 89%. While New Orleans was in the throes of a downward population trend since 2000, its poor and African American population was least likely to leave their long time homes.

*337 To re-build a New Orleans and indeed a Gulf Coast that isolates its African American and poor population defies a lesson learned about the value of diverse populations, particularly as it relates to the poor. One study of results of the court mandated public housing case in Chicago suggest that economically diverse communities produced far greater incomes, educational attainment, employment and lifestyles for historically poor families than non-diverse neighborhoods of concentrated poverty. People who have for so long invested in New Orleans and the Gulf Coast deserve the opportunity to return to their beloved cities. However, they should consider the import of redesigning their communities to provide for economic and racial diversity.

IV. Eminent Domain and Usufruct: A Foundation under the Law for Federal and Local Redevelopment Plans

A. Condemnation under the 5th Amendment Takings Clause

Condemnation is the process of taking private property for public use through the government’s power of eminent domain. This power derives from the Fifth Amendment Takings Clause of the U.S. Constitution. The constitutional amendment
requires that the government can only take private property for public purposes and must pay just compensation to the owner, typically based on the fair market value of the property. The traditional view was that the government could take private property for public purposes that *338 primarily involved the development of public parks and public highways. However, the recent U.S. Supreme Court decision in Kelo v. New London altered this traditional view of “public purpose” by allowing the government to take private property for “private commercial development” so long as just compensation was paid to the owner based on fair market value. The Court’s ruling allowing private property to be taken for commercial development is considered by many as permitting the government to take private property for private purposes under the Fifth Amendment. However, the United States Supreme Court in Kelo recognized the taking as one for public purpose. The Court’s view was that private property taken for commercial development is essentially for public purposes because it provides jobs, public benefit including boosts to the public economy.

B. Usufruct as a legal tool to rebuild New Orleans

To rebuild the most devastated areas plagued with blight in the aftermath of Katrina, Mayor Ray Nagin has proposed a “Will-To-Rebuild” plan allowing residents a four-month period to support the redevelopment of their neighborhoods. The proposal is predicated on a long existing Louisiana’s legal concept of “usufruct” which entitles a person the right to use and profit from another person’s private property for a period of time, similar to a life estate. “Usufruct” has primarily been used to allow a wife to gain control of property after her husband died. Under Nagin’s plan, the city would use “usufruct” to gain an interest in privately owned properties that are currently blighted and uninhabitable. The owners would continue to retain title, but the plan would allow the city to control and pay for the rehabilitation. Not every hurricane damaged property would qualify for the usufruct plan. Qualifying properties must be located in neighborhoods that suffered significant destruction. These neighborhoods will be subject to a “critical mass test” where residents will have to demonstrate that their neighborhoods have sufficient critical mass area for rebuilding, thus, warranting government investment and repairs. Neighborhoods with sufficient critical mass will *339 allow the city and residents to enter into a “usufruct” contract allowing the city to have limited control over the property for a certain period and foot the bill for rebuilding to minimum standards of habitability. After the properties have been repaired, the city will assume the mortgage notes to the property and rent it at a subsidized rate to essential city employees such as teachers, policemen, and other city service workers. After a certain period, the resident owner will have the option of moving back to the property but only after reimbursing the government for repair costs. If the resident chooses not to move back or cannot afford to reimburse the government, the city will sell the property and the profits will be shared between the government and resident.

Mayor Nagin’s “Will-To-Rebuild” Plan is premised on the theory that the “usufruct” concept would more efficiently meet the city’s goals and best serve the residents’ interests. The city authority posits that condemnation of property would not be efficacious since it would be more expensive to administer. Under condemnation, the city would be required to pay upfront for private property that is taken as opposed to the “usufruct” concept which enables the city to have an interest but not title to the property unless it is later foreclosed. Moreover, condemnation of private property would raise much more concerns and create a political backlash.

C. The advantages and disadvantages of condemnation should be examined to determine which better supports the rebuilding of New Orleans as compared to the “usufruct” scheme

There are advantages under the city’s proposal. Proponents of the plan argue that it will allow residents, who are financially unable to make repairs on their own, the opportunity to have their properties repaired by the government who will assume the mortgage note and pay for the necessary repairs to restore it to minimal standards of habitability. The plan will also encourage essential city workers to return back to the city in order to help restore essential city services. The plan also provides flexibility to the homeowner who may choose to return to the city, and reimburse it for the repairs made or to sell the property realizing equity. Notably, the plan is a legal strategy allowing the city to have limited control over private property without constituting a “taking” under the Fifth Amendment which requires *340 just compensation to the owner. Although the reason for such legal maneuvering might seem trite, it would at least avoid the challenge of calculating “just
compensation” to destroyed property, effectively re-victimizing the landowner.

However, the city’s proposal has elicited fervent disapproval among some residents of the community. The city’s proposal could impose significant disadvantages for displaced residents who would not be able to afford to reimburse the government for repairs costs that may have been significantly marked 10-20% up from average repair costs. Apparent cost savings theoretically realized by the size of the rehabilitation contracts may be lost in the mark ups contractors place on government contracts. This “premium” is often associated with such government mandates of Davis-Bacon compliance and general recordkeeping. The government’s history of inefficiency and ineffectiveness after Katrina has also given many citizens cause for concern that the plan will be another step in a continuing debacle. There is additional question about the notice of the plan to displaced citizens whose whereabouts may still not be officially known. Opponents of the proposal argue that the city’s plan is a scheme aimed at moving out displaced residents permanently, in order to rebuild the city into a “whiter and wealthier” New Orleans. There is fear by many that the city’s plan disregards the historical roots of New Orleans and will result in displacing poorer African-American residents with richer whiter ones.

D. Legal Protections for Families Under a Federal Redevelopment Plan

The fear is understandable; however, there are existing laws against racially motivated displacement if the government’s action discriminatorily affects the city’s poor and African-American citizens. Federal law prohibits discrimination in housing programs that receive federal funding. Moreover, citizens who are discriminated against because of their race may individually file a lawsuit in court or complaint with HUD under the 14th Amendment, Civil Rights Act of 1964 or the Federal Fair Housing Act. A successful plaintiff is entitled to remedies that include monetary damages, actual damages, punitive damages, attorney’s fees, court costs, damages for emotional distress, and injunctive relief enjoining government entities from systematically discriminating against persons that perpetuates poverty and racial segregation. The U.S. Supreme Court has held that while a state action “will not be held unconstitutional solely because it results in racially disproportionate impact; proof of racially discriminatory intent or purpose is required to show violation of Equal Protection Clause”. Consequently, for a successful plaintiff’s lawsuit, the claim must involve a state action and proof of the government’s discriminatory intent as well as discriminatory impact.

In Adarand v. Pena (1995), the U.S. Supreme Court also held that, “All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by [the] reviewing court under strict scrutiny which requires the government to prove that its methods of discrimination were based on a compelling state interest and its actions were narrowly tailored to meet that interest. Under the strict scrutiny test, the state’s discriminatory methods will most certainly be struck down because discrimination based on race is not viewed as a compelling state interest and does not serve any legislative purpose.

*342 V. Other Redevelopment Options: Short Term and Long Term Solutions

The type of housing product that will be built in the redeveloped region should also be considered closely. Some of the housing that will be replaced will be market priced homes, while others will need to be affordable. Affordable housing means different things to different incomes and most affordable housing is not affordable to low-income families. As a consequence building housing in the affected regions will need to take on various design alternatives to what we may normally think of. Regardless of the housing type that is built, it must be built to withstand storm-force winds. Municipal building codes should be replaced or modified to reflect adequate building requisites to ensure protection of property from large storms particularly in areas subject to hurricanes.

A. The Manufactured Home

Modular buildings are alternative to the standard brick and mortar home and can be built as temporary or permanent
depending on how they are attached to the foundation. Modular homes are defined as a home whose components are manufactured in a factory, and then transported in sections to its final location where it is assembled by a homebuilder. Modular homes commonly are lower priced than conventional construction, can provide for energy sufficiency, and are regulated. Modular buildings are increasingly popular for construction of multi-family rentals and ownership properties. They have also been constructed in coastal regions.

Mobile homes can also provide a temporary housing product that could more immediately house Gulf Coast evacuees. Like the modular home, the mobile home is also a manufactured home. “Mobile home” is defined to mean a structure, transportable in one or more sections, built on a permanent chassis and designed for use with or without a permanent foundation when attached to the required utilities. The term mobile home does not include a recreational vehicle.

*343 B. Habitat for Humanities product*

Habitat is a worldwide, grass-roots movement started in 1976 to build simple, decent, affordable houses in partnership with those who lack adequate shelter. Since its inception, it has built more than 175,000 houses, providing shelter for nearly 900,000 people worldwide. At work in 100 countries, Habitat builds a house every 26 minutes and is sheltering more than 1 million people at an average cost of $59,324 in the United States. Additionally, habitat houses are affordable for low-income families because there is no profit included in the sale price and no interest charged on the mortgage. Mortgage length varies from seven to 30 years. Habitat relies on volunteer labor and donations of money and materials to build and rehabilitate its homes with the help of the homeowner (partner) families. Habitat houses are sold to partner families at no profit, financed with affordable, no-interest loans. The homeowners’ monthly mortgage payments are used to build still more Habitat houses.

Low-cost housing studies in the United States and Canada show affordable housing has no adverse effect on other neighborhood property values. In fact, Habitat houses have increased property values and local government tax income. Habitat houses in the United States are generally built using wood frame construction, with gypsum board interior walls, vinyl siding and asphalt shingle roofs. Some homes have also used adobe or straw bale construction. What is compelling about this product is the time that it takes to be constructed; in 1998, Habitat built 100 houses in a single week in Houston, Texas.

Habitat for Humanity has started their first New Orleans area project in St. Bernard Parish. The project targets low-income displaced residents that fall within the minimum low-income threshold. The minimum and maximum yearly incomes are in accordance with HUD’s low-income requirements. Habitat for Humanity does not only establish affordable housing but low-income housing which allows more displaced residents the opportunity to move back to New Orleans. This project serves the best interests of displaced, financially disadvantaged residents and helps in the redevelopment of New Orleans.

*344 C. Community Land Trust*

In addition to considering a myriad of housing product, there may be an issue with land reclamation. One way for a community to control its development and redevelopment is through the community land trust.

Governments or private interests can develop the community land trust. The trust focuses on housing and community development completed in a design and according to a plan embraced by the stakeholders. The purpose of the trust is to acquire and hold land, selling it off to individuals and commercial owners who agree to use the land in accordance with the land use restrictions placed on the property. The trust is useful in promoting affordable rentals and homeownership as the trust can set its land prices low for home sales or can retain land ownership so that the owner need only pay for the structure placed on the land. In the latter situation, the purchaser may choose to enter into a lease agreement for the underlying land but it is not necessary to do so. Since often, especially in urban areas, it is the price of the land that realizes increases, owning the structure proves to be affordable to the user. Often there are terms of the agreement that permit the purchaser to realize some part of the increased value on sale of the property to another affordable housing owner. It is advisable that land owned by the
trust be part of a tax abatement plan that limits the annual tax appraised value of the land.

The government additionally has the general power of eminent domain. Under this power, it can identify private land that is central to the redevelopment of the community and claim it for value from the private landowner.

D. Rehabilitation

Some of the housing in the affected areas are salvageable and can be rehabilitated. Where possible, this should be done to help retain historical architecture and communities. The planning group should be careful to consider building rehabilitation codes that intelligently address the need for modification that addresses the geographical conditions as well as the preservation issues. The United States Housing and Urban Development Department has developed a guide to such code creation.

*345 There are other reasons for rehabilitating properties, especially in the troubled region. For example, rehabilitation helps sustain the useful life of older properties that may not have historical preservation significance. While the overwhelming share of rehabilitation of America’s properties is completed without government investment, there are government programs that provide funding for housing rehabilitation.

VI. Partnership, Policies and Financial Programs

Another of the difficult problems that face rebuilding efforts is the cost of the rebuilding coupled with the cost/benefit analysis demanded by a capitalist society. Capitalism is an economic system where most of its means of production are owned and managed privately, for profit where decisions affecting investment of capital, production, distribution and prices are determined in a free market. Thus because, at the root of capitalism is the drive for self-interest rather than public good, there should be established strong public private partnerships that provide for private profits that also provide for the good of the public.

There are various ways that partnerships can benefit the Gulf Coast rebuilding effort. Among them is ensuring that contractors and investors can maximize their profits without gouging the government or the local public. Much of the business along the Gulf Coast region suffered from the hurricane and its aftermath. Government policies that affirmatively provide opportunities for the business and tradespersons in the affected area should be adopted. Businesses from outside the community should be encouraged to partner with area businesses and to hire local workers. This will help rebuild the local economy that will be able to support the building housing market. In addition, the creation of jobs for populations that have high rates of unemployment and poverty will help fuel the new economy.

But government policies will not be enough. Many of the persons who suffered the brunt of the storm continue to face severe financial problems, including rising debt, lost property and damaged credit scores. The short term credit deferments and other assistance packages generally wore off after ninety (90) days. While a laudable thing, it was not enough for consumers who have faced the kind of hardship created by Katrina. Loss of good credit or impaired credit could have long term consequences, since in most cases mortgages and business loans are dependent on credit scores. A number of programs have already been proposed to help address these problems, particularly as they relate to housing, including the low income tax credit program.

A. The Low Income Housing Tax Credit

The Low Income Housing Tax Credit was created in 1986 to provide incentives to the private market to develop new construction of low and moderate income housing. The program would provide ten years of tax credits to investors who backed housing developments where a portion of the units were affordable to low income renters for at least 15 years. As a
result of private influence, 42% of all LIHTC properties have been developed in more diverse suburban communities than in areas of concentrated poverty.\textsuperscript{68}

One study reported that “neighborhoods where LIHTC units were built in the 1990s improved on socioeconomic and housing measures absolutely and relative to other neighborhoods.”\textsuperscript{69} The success of the low-income housing tax credit for rental units has spurred a call for a similar program to encourage construction of low-income homeownership opportunities.

\textsuperscript{347} The Katrina Tax Relief Act of 2005 was enacted to assist displaced evacuees by providing numerous benefits including a waiver of low-income housing tax credit rules to permit owners of low-income housing to provide the units to the evacuees even if they do not qualify as low-income.\textsuperscript{70}

\textbf{B. Mortgage Lending}

Mortgage companies offered their evacuee customers mortgage deferments and extended payment plans. However, such plans have a limited effective period and many homeowners are experiencing hardships beyond that period. Those homeowners who were able to return to their homes and live there while undergoing rehabilitation fared better than most. But those homeowners who lost their homes and as a consequence had to live elsewhere may have fared less well but all right even if they had adequate insurance to retire the indebtedness. Those homeowners that fared worst lost everything and had no insurance but are left with a mortgage and those whose homes were not lost but damaged severely enough that they are out of their homes and have a mortgage. In these instances, not only is the homeowner paying a mortgage on a house they cannot live in but is additionally paying the cost of temporary housing. In addition, many of these persons are also paying rehabilitation costs.

The need for mortgage innovations has spurred comment from the federal financial regulatory agencies proposing guidance on residential mortgage products that allow borrowers to defer repayment of principal and sometimes interest.\textsuperscript{71}

Another mortgage-based problem impacting Katrina evacuees is that presented by sub-prime lenders\textsuperscript{72} and predatory lenders. Many of the cities in the Gulf Coast affected by Hurricane Katrina have among the highest levels of subprime lending.\textsuperscript{73}

In addition, recent studies show that racial disparities continue to exist in lending.\textsuperscript{74} A nationwide lending survey confirms the stark racial disparities \textsuperscript{348} in mortgage lending continue to exist in this country long after the enactment of the Community Reinvestment Act in 1977.\textsuperscript{75} The study, conducted by the Federal Reserve Board, shows that African-Americans were far more likely than whites to receive high-cost loans, even after controlling for factors such as the borrower’s income.\textsuperscript{76} This pattern of discriminatory lending could have a significant impact on Katrina evacuee borrowers, many of whom are African American.

A more sinister form of non-conventional lending is the predatory loan. Predatory loans are characterized by excessively high interest rates or fees, and abusive or unnecessary provisions that do not benefit the borrower, including balloon payments or single-premium credit life insurance, large prepayment penalties, and underwriting that ignores a borrower’s repayment ability. Yet, although high interest rates or fees are common characteristics of predatory loans, high-cost loans are not necessarily predatory. And depending on the unique characteristics of an individual loan and specific borrower, loan provisions that may be predatory in one instance, such as a prepayment penalty, may be reasonable and legitimate under others.\textsuperscript{77}

\textsuperscript{349} Again, predatory lending practices are more likely to affect African American borrowers. If predatory lending practices are not significantly curbed during the New Orleans and Gulf Coast renaissance, many of the evacuees will be victimized again.

\textbf{C. Community Reinvestment Programs}
Congress enacted the Community Reinvestment Act (CRA) in response to discrimination by financial institutions against racially and ethnically disenfranchised people and their communities. Financial institutions have historically practiced redlining, which is a systematic denial of credit to persons living within certain communities. ‘Redlining’ got its name from a lender’s process of outlining in red certain poor neighborhoods on a map, in order to indicate areas considered “too high” a risk for lending. Often, however, red lines were drawn not based on financial risks but on racial considerations.

There is no indication that Congress perceived the CRA as a means of directly prohibiting racial discrimination in lending; however, the statute’s text provides that regulated financial institutions are required by law to demonstrate that their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business. The statute’s purpose and effect are consistent with prohibiting racial discrimination because failure to meet the credit needs of a community often parallel racial discrimination. Consequently, there is a general consensus that the CRA was intended to remedy the problems of discrimination in lending. There is evidence that one of the greatest challenges for meeting that goal is the historical racial and ethnic animus in the policies of the financial industry.

Almost thirty years after the passage of the Community Reinvestment Act, recent studies show that there still exists racial discrimination in the lending industry. Data recently released by the Federal Financial Institutions Examination Council revealed that even when statistics were controlled for non-racial differences between borrowers, African Americans were considerably more likely to pay higher costs for loans than Hispanic or white borrowers. Additionally, disparities in lending continued to exist between the races.

There are various things that lenders who serve the Gulf Coast region can do to comply with their community reinvestment responsibilities. Focus should be on eliminating barriers to credit that could include everything from relaxing strict borrowing criteria to establishing generous refinancing opportunities to homeowners. Additionally, the region could make use of the Community Development Banking and Financial Institutions Act which was enacted to create linkages between community development and financial institutions.

Conclusion

There is no doubt that Katrina exposed multi-level incompetence, failed public policies, poor community planning, breaches in governmental protection and security systems and significant social inequities. “After the levees broke, we watched every single system associated with the life of a city fail: the electric grid, the water system, the sewer system, the transportation system, the telephone system, the police force, the fire department, the hospitals, even the system for disposing corpses.” No government agency or individual was prepared for the disastrous results post-Katrina.

Yet, notwithstanding the fact that appropriate authorities had been warned of the consequences of inaction and bad action, the worst case scenario has provided an opportunity for correction. Comprehensive planning is required to address the myriad of breakdowns that have occurred; housing being only one of them. The torment of homelessness and hopelessness can result in loss of human life and diminished quality of life if housing is not immediately addressed. Short term housing is still needed and long term housing along the Gulf Coast should be re-built under tested building code regulation in keeping with sustainable communities guidelines. The task cannot be exaggerated and the time calls for better leadership than what we have seen. Greater men and women with the “right” expertise, talent, and resources must come together immediately to resolve the housing and rebuilding problems of the Gulf Coast. This paper has sought to provide some ideas.

Footnotes

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According to former FEMA Director Mike Brown during an interview on the Larry King Live television show which aired on Wednesday, August 31, 2005.

Federal officials speaking before Congress on September 8, 2005.


Id.

United States Census, http://quickfacts.census.gov/qfd/states/22/2255000.html (showing that 23.2% of New Orleans residents, 21.2% of Mobiles residents, 24.7% of Birmingham’s residents, and 14.6% of Biloxi’s residents lived in poverty) (last visited Jan. 28, 2006).

Id. (discussing that for the same period, median incomes in the following cities were: Biloxi, Mississippi, $34,106; Atlanta, Georgia, $37,385; Houston, Texas $37,483; Dallas Texas, $38,125). See also Income, Earnings, and Poverty from the 2004 American Community Survey, http://www.census.gov/acs/www/ (U.S Census Bureau report issued August 2005, stating that in 2004 the median household income in the United States was $44,684) (last visited (last visited Jan. 29, 2006).


Id. See also, Nicholas Retsinas, One expert’s opinion, Joint Center for Housing Studies, www.jchs.harvard.edu/media/expertopinion_affordable_shortage.htm.

United States Census, supra note 6.

Tomas Alex Tizon & Doug Smith, Most Katrina evacuees didn’t go far, L. A. Times, Dec. 17, 2005, available at http://www.insidebayarea.com/portlet/article/html/fragments/print_article.jsp?article=3318387 (reporting that the numbers of evacuees include 65% by people from New Orleans areas). Nearly 15% of the Orleans Parish evacuees moved to Las Vegas, San Francisco Chicago and Boston. About 80% of the evacuees remained in the southern states with top destinations being suburban New Orleans, followed by Houston, Baton Rouge, Dallas and Atlanta. See also www.cbsnews.com/elements/2005/09/06/in-depth-nature/map818349.shtml reporting that Louisiana had placed almost 60,000 evacuees; Texas, more than 200,000, Arkansas about 50,000, Georgia, 44,000, Mississippi about 11,000 and Alabama a little more than 2,600.
Comparatively, Houston’s poverty rate is 13.3%; Dallas is 13.1% and Atlanta at 11.9%.


Retsinas, supra note 10.


Id. at 17.

Id. at 17-18.

30 Frey, supra note 8. Houston, Dallas and Atlanta also have high segregation numbers at 71%, 64% and 69% respectively.

31 Id. (comparing those numbers with Houston, Detroit, Oakland and Atlanta at 75%, 72%, 61% and 57%, respectively).

32 James E. Rosenbaum, Housing Mobility Strategies for Changing the Geography of Opportunity, Institute for Policy Research, Northwestern University, 1994; and see Lawrence F. Katz, Jeffrey R. Keith Jeffrey B. Liebman, Moving to Opportunity in, Boston: Early Results of a Randomized Mobility Experiment, 116 Quarterly Journal of Economics 607 (2001) which found that “the concentration of poverty in inner cities, along with recent increases in residential segregation by family income and the persistence of residential segregation by race in U.S. metropolitan areas [Cutler, Glaeser, and Vigdor 1999; Jargowsky 1996], has potentially disturbing implications because of evidence that residential neighborhoods are associated with both the current well-being and future opportunities of residents. In particular, children who grow up in poor neighborhoods fare substantially worse on a wide variety of outcomes than those who grow up with more affluent neighbors even in studies that include detailed controls for family income and background characteristics [e.g., Brooks-Gunn et al. 1993].”


34 Id.


36 Id.


39 Id.

40 Id.

41 Id.

42 Id.

43 40 U.S.C. § 3142, Title 40, subtit. II, part A, ch. 31, subch. IV (Rate of Wages for Laborers and Mechanics which is applicable when the federal government is a party to the construction contract involving public property. Depending on the structure of the
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program, Davis Bacon Act may not apply).


45 There are numerous civil rights cases interpreting Title VII, I believe that address discriminatory intent vs. discriminatory impact or effect. Use this note to briefly teach that issue.

46 Housing and Community Development Act of 1974, § 109, tit. I.

47 U.S. Const. amend. XIV:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

48 Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, states:
All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

49 42 U.S.C. § 3601, Fair Housing Act (Title VIII).

50 Id.


53 Id.


According to the United States Department of Housing and Urban Development’s Office of Policy Development and Research, the Community Development Block Grant program, for example, spends almost 25% of its monies for rehabilitation. The CDBG program helps fund the rehabilitation of between 175,000 and 200,000 units annually. The HOME program funds about 30,000 rehabilitated units per year. See David Listokin & Barbara Listokin, Office of Policy Dev. & Research, U.S. Dept. of Hous. Dev., Barriers to the Rehabilitation of Affordable Housing 1 (2001).


Lance Freeman, Sitting Affordable Housing: Location and Neighborhood Trends of Low Income Housing Tax Credit Developments in the 1990s, at 11, The Brookings Institution, Center on Urban and Metropolitan Policy, March 2004.


National Home Equity Mortgage Association, Press Release, Nonprime Mortgage Lenders Providing Unprecedented Relief To Homeowners Affected By Hurricanes Katrina and Rita (Sept. 23, 2005).


See the 2004 Fair Lending Disparities: Stubborn and Persistent report, supra note 67, finding “Minorities, women, and low- and moderate-income borrowers across the United States of America receive a disproportionate amount of high cost loans. Across the country, African-Americans received 18 percent of the conventional subprime loans but only 6 percent of the conventional prime loans during 2004. In contrast, whites received a greater percentage of prime than subprime loans. Whites received 55.3 percent and 66.4 of the subprime and prime loans, respectively. Disparities are also present by gender. Females received 36.8 percent of the subprime conventional loans but just 28 percent of the prime conventional loans in NCRC’s sample of 2004 loans. Males, in contrast, received a higher percentage of prime loans (67.5 percent) than subprime loans (59.8 percent).”

James H. Carr & Lopa Kolluri, Predatory Lending: An Overview, http://www.knowledgeplex.org/kp/text_document_summary/article/reftfiles/hot_topics/Carr-Kolluri.pdf, finding that subprime loans are three times more likely in low-income neighborhoods than in high-income areas, and five times more likely in black neighborhoods than in white neighborhoods. In predominantly black communities, high-cost subprime lending accounted for 51 percent of home loans in 1998, compared with only 9 percent in predominantly white areas. [Further findings are] that homeowners in high-income black neighborhoods are six times as likely as homeowners in upper-income white neighborhoods, and twice as likely as homeowners in low-income white neighborhoods, to have subprime loans. Thirty-nine percent of homeowners in high-income black neighborhoods had subprime loans, compared with 6 percent of homeowners in upper-income white neighborhoods and 18 percent for homeowners living in low-income white neighborhoods.


Id. at 91.

Federal Reserve Board Study released September 2005; and see supra note 71.

Id.

Id.


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