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October 20, 2005
OPINION NO. 05-0373

Hon. Benny Rousselle
President, Plaquemines Parish
Plaquemines Parish Government
106 Avenue "G"
Belle Chasse, LA 70037

Dear President Rousselle:

Power exists for local governments to enter private land for demolition and debris removal in an emergency situation. If local ordinances do not exist to allow for such activity, they must be created. Due process can be suspended in the interest of protecting the health and safety of the public by demolishing hazardous structures. Compliance with local, state, and federal historic preservation laws is required, despite the relaxation of due process. Once the emergency situation abates, due process returns to normal. Political subdivisions may be liable for takings due to demolitions.

You have requested an opinion of this Office as to the correct procedures to be followed, under the emergency situations created by Hurricanes Katrina and Rita, to ensure compliance with State law on the matter of demolition and debris removal from private property in the wake of these disasters. We are cognizant that this opinion will have far-reaching implications for all of the parishes and municipalities affected by these storms. Thus, this opinion shall first give a general review of the law in the areas of debris removal, entry onto property, and historic preservation, and then shall set forth specific guideposts upon which local governing authorities may rely in cleaning up the mess.

There is a real tension here. On the one hand, dire circumstances call for quick and decisive leadership to clean up the mess left by the hurricanes so that the rebuilding process can commence. In that sense time is of the essence. Without prompt action, there is a real danger that recovery will never occur. On the other hand, the Federal Emergency Management Administration (FEMA) requires that unless due process is afforded to victims of the Hurricane, it will not reimburse local governments for the clean up. The linchpin of this policy is to guarantee that people who have already been victimized by the natural disasters are treated fairly and even-handedly by their governments and are compensated for any taking that may occur. The irony is, however, that these requirements have the effect of bringing the entire process to a standstill. Giving notice to every landowner whose property has been impacted by the hurricanes is impractical because, in many instances, no one knows where the landowners now live. Additionally, the cost of following state statutes or local ordinances that typically apply in condemnation/demolition situations would be unduly expensive. The central question in this instance becomes: Is there any way to relax due process requirements in a disaster to permit the recovery to begin? It is the opinion of this Office that the answer to that question is in the affirmative. The complete legal analysis of this answer is contained below.

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We should first, however, caution that this opinion, in no way, authorizes summarily dispensing with due process requirements in an emergency or any other situation. This opinion is intended to apply only to the after-effects of these two storms. The entire purpose of this opinion is to provide a means for streamlining existing methods for conducting demolition and debris removal on private property, while maintaining as many due process protections as possible and continuing to comply with all State laws.

The information contained in this opinion does not constitute authorization on behalf of the State for haphazard or indiscriminate demolition of structures that threaten public health. Rather, this opinion should be construed as an aid to understanding the law on right of entry and debris removal as it already exists in the Louisiana statutory and jurisprudential schemes. We strongly recommend that the determination as to whether or not to demolish structures be made on a structure by structure basis. Each determination to alter or demolish structures must be undertaken with due respect and sensitivity to the rights and interests of those affected by such action. Ultimately, the final decision regarding debris removal, right of entry, and demolition rests with the local authorities.

Pursuant to the FEMA Recovery Division Policy No. 9523.13, this opinion further represents “a written opinion from the relevant State’s Office of the Attorney General confirming the legal basis under state constitutional and statutory authority for the State, county and municipal governments to enter private property to perform debris removal.” *Id.* at ¶7(E). Such an opinion is required by FEMA in order for certain normal condemnation and nuisance abatement procedures to be circumvented in exigent situations, as discussed more fully below. The constitutional authority derives from La. Const. Art. VI, Sec. 7 for non Home Rule Charter governmental subdivisions and from La. Const. Art. VI, Sec. 6 for Home Rule Charter governmental subdivisions (which allows the latter to create necessary laws under its Home Rule Charter).

Two previous opinions of this Office have dealt with matters concerning the placement of tarps on private property to reduce future damage and the use of private property to make emergency repairs to the levee systems in Louisiana. See La. Atty. Gen. Op. Nos. 05-0360 and 05-0360-A. This opinion is in no way intended to overrule or otherwise interfere with those opinions, but rather should be viewed as complimentary to those opinions. Indeed, both of those opinions are instructive with regard to the matter that you have raised here and are discussed below, where necessary.

In the wake of the devastation unleashed upon Southeast Louisiana as a result of Hurricane Katrina, FEMA, through their Public Assistance Office, is overseeing matters related to debris removal and demolition in the affected areas. Although FEMA is overseeing these matters, the burden of actually putting the cleanup

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process into action falls to local governments. Thus, you have asked this Office to outline the procedures necessary for local governments to authorize entry onto private property in order to facilitate debris removal and demolition. In keeping with this request, the following is a series of guidelines and legal authorities intended to aid local officials through this portion of the recovery effort.

FEMA requires strict adherence with local, state, and federal laws in order to secure reimbursement for expenses. Specifically, to be eligible for FEMA reimbursement, local governments must act in accordance with the appropriate statutory authority to enter private property for the purpose of debris removal and other activities deemed to be in the public interest. Therefore, it is necessary for local authorities to follow the guidelines contained herein before proceeding with or authorizing any activity on private property.

State of Emergency

Pursuant to State of Louisiana Proclamation Nos. 48 KBB 2005 and 54 KBB 2005, Governor Kathleen B. Blanco declared a state of emergency in the State of Louisiana. The purpose of this state of emergency, which is in effect from August 26, 2005 through October 25, 2005, is to allow governmental authorities to deal with the damage and destruction caused by Hurricane Katrina. Additionally, Governor Blanco also issued Louisiana Proclamation No. 53 KBB 2005, which implements a state of emergency as a result of Hurricane Rita and lasts from September 20, 2005, until October 20, 2005.

In order to effectively respond to this State of Emergency and the State of Emergency declared by President Bush, FEMA has issued a Hurricane Katrina specific policy for debris removal from private property. FEMA Recovery Division Policy No. 9523.13. This policy was issued on September 7, 2005. The policy provides guidance on the appropriate use of funding, as provided for in the Stafford Act, 42 USC 5121 *et seq.*, for debris removal and disposal, including demolition of unsafe structures from private property in areas affected by Hurricane Katrina. According to FEMA regulations implementing Sections 403 and 407 of the Stafford Act (42 USC 5170b & 5173), specifically 44 CFR § 206.224, in order to be eligible for reimbursement debris removal must be in the "public interest." "Public interest" is defined as being necessary to:

- (1) eliminate immediate threats to life, public health, and safety; or
- (2) eliminate immediate threats of significant damage to improved property; or
- (3) ensure economic recovery of the affected community to the benefit of the community at large.

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Id. “FEMA will work with each State to designate those areas where the debris is so widespread that removal of the debris from private property is in the “public interest” under 44 C.F.R. § 206.224 and thus, eligible for FEMA reimbursement.” FEMA Recovery Division Policy No. 9523.13, ¶2A.

The debris removal may very well require the complete demolition of a private structure in order to ensure the protection of public health and safety. However, we caution that the demolition of structures should be a last resort in the recovery process, only used when no other option is available. Additionally, to the extent that private owners can be identified and located in a timely manner, we urge the local authorities to secure waivers of right-of-entry, debris removal, and demolition from them. However, in light of the reality that substantial portions of the population of South Louisiana has been scattered among nearly all of the fifty United States, the following analysis provides for methods whereby local authorities can expedite the debris removal and demolition process while continuing to comply with the law.

Demolition, Debris Removal, and Right of Entry Issues

Basically, in order to comply with FEMA regulations, debris removal and entry onto private property must be accomplished according to established municipal ordinances. FEMA, *Public Assistance Debris Management Guide*, 35 (FEMA 1999). This basic tenet raises two major problems: (1) many of the localities affected by Hurricanes Katrina and Rita may not have municipal ordinances that grant them a right-of-entry onto private property or assist in expediting the demolition or debris removal process for the purposes of abating or removing public health or safety hazards or to mitigate imminent threats to property; (2) where such ordinances do exist, they are often burdened with time delays for notice and other due process matters that would substantially hamper the necessary expediency of recovery efforts in the wake of the hurricanes.

Speaking directly to the issue of debris removal or property demolition, the Louisiana jurisprudence provides ample support for municipal activity undertaken in the best interests of the general public that would otherwise constitute a taking if not occurring during an emergency situation. In 1882, the Louisiana Supreme Court noted, with respect to the police power, that,

[t]here are cases where it becomes necessary for the public authorities to interfere with the control by individuals, of their property, and even to destroy it, when the owners themselves have fully observed all their duties to their fellows and to the State, but where, nevertheless, some controlling public necessity demands the interference or destruction. Strong instances exist where it

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becomes necessary to take, use or destroy the private property of individuals, to prevent the spreading of a fire, the ravages of pestilence, the advance of a hostile army, or *any other great public calamity*.

Bass v. State of Louisiana, 34 La. Ann. 494 (1882) (emphasis added). This case has also been cited in more recent Louisiana Supreme Court cases as authority for justifying takings without compensation. See *Avenal v. State*, 886 So.2d 1085, 1106 (La. 2004). Thus, it is well settled that the activities of debris removal and demolition contemplated by the local governments supercede the interests of individual citizens during this state of emergency as the activities are in the best interests of the people. See also, *Givens v. Town of Ruston*, 55 So.2d 289 (La.App. 2 Cir. 1951). As has been shown, legal precedents support the suspension of due process in exigent circumstances, however, there is no guarantee that this authority to suspend due process insulates municipalities from lawsuits for takings of private property.

Although we have identified the authority to enter private property and to, if necessary, alter or demolish it, there are still formal FEMA requirements that must be followed in order to ensure that the local governments will be reimbursed for their expenditures.

Situations Where Local Ordinances Do Not Contain Necessary Law

In situations where no such municipal ordinances exist that would grant a right-of-entry or a right to demolish, local laws cannot be followed because no law exists, making compliance with FEMA requirements impossible. Therefore, in instances where local ordinances have not already been enacted, the local governing authority must create them before reimbursable work can commence. The Louisiana Revised Statutes provide a mechanism for the creation of such new ordinances.

Title 33 of the Louisiana Revised Statutes provides for the relative powers of local governments. The legislature enacted La. R.S. 33:1236 which defines the powers of local governing authorities. Several of the sections of this title deal with the authority of police juries and other local governing authorities to enact ordinances prohibiting public nuisances, specifically—regulating unhealthful growths, trash, debris, refuse, or discarded or noxious matter, and trash and debris, and relating to the repair and condemnation of buildings, dwellings, and other structures that have become derelict and present a danger to the health and welfare of residents. Louisiana Revised Statutes 33:1236(21) and 33:1236 (49) are of import to the legal issues involved in the removal of debris from private property and the condemnation of buildings which pose a threat to public

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health and safety. They also give the local governing authorities the power to enact ordinances regulating both debris removal from private property and the condemnation and demolition of structures for public health and safety reasons.

Keep in mind that the provisions contained in La. R.S. 33:1236 are parish-specific (different paragraphs of 1236 give certain parishes specific powers relating to that parish), and do not apply to Orleans Parish. La. R.S. 33:1244. Local authorities of Orleans Parish should look to La R.S. 33:4752 for provisions on the removal of dangerous structures in their parish.

Thus, pursuant to the authority granted by the Legislature in La. R.S. 33:1236, affected parishes may create ordinances that allow for right-of-entry for the above-mentioned purposes. Alternatively, La. R.S. 29:737 likely grants municipal chief executive officers the authority to issue orders “to preserve the public peace, property, health, or safety within the municipality.” Under this authority, it may be possible for the municipal chief executives to issue orders accomplishing the same goals as the above discussed ordinances. However, because of the vague nature of this statute with respect to such powers, this Office is of the opinion that the above discussed approach for creating municipal ordinances is a more secure method of ensuring compliance with the law to assure FEMA reimbursement.

This Office recommends that such ordinances or orders be narrowly tailored to fit the specific needs of the local government for the effects of Hurricanes Katrina and Rita so as to minimize the use of what would be a substantial impairment of due process rights under nonemergency conditions. Additionally, in enacting such ordinances, the governing authorities of the affected local governments must comply with the standard laws and practices for the creation of ordinances. Failure to so comply could result in the federal government’s declaring local ordinances invalid. This, of course, would thwart the attempts of local governments to obtain FEMA reimbursement for their work later.

Situations Where Local Ordinances Do Contain Necessary Law

In the interest of expediency, we have not undertaken an extensive review of each affected parish’s local ordinances to determine which ones do and which ones do not contain the necessary language to allow a right of entry. We leave this task to the local governments who are more familiar with and can more easily navigate their own laws. Nevertheless, there will likely be instances where local ordinances do contain some language that would permit government agents or their designees to enter private property. In instances where such authority may exist, there are still concerns about providing due process to the affected landowners if their property is to be substantially altered or demolished in order to protect the public health and safety.

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The suspension of constitutional requirements, as imbedded and reflected in local ordinances, must be addressed here as well. First, if ordinances do exist that are sufficient to satisfy the reimbursement requirements of FEMA, then the notice and due process delays must be circumvented. The reason for circumventing these due process protections is simple: Considering the scattering of South Louisiana's population across the United States, it would be impossible to provide adequate notice to affected landowners before entering or altering their private property. Indeed, FEMA, in Policy No. 9523.13, ¶7B, recognizes that such circumstances exist in certain areas in South Louisiana, making compliance with the normal condemnation and abatement procedures impractical.

In order to return the affected areas to some semblance of normalcy and or operability, it is necessary that debris removal and health-hazard abatement begin post haste. In the interests of accomplishing these goals, it would be impractical, if not completely impossible, to comply with the typical due process requirements associated with right of entry and/or condemnation proceedings. As a basic notion, the law does not require anyone to perform vain and useless acts. See *e.g. Moore v. St. Paul Fire and Marine Insurance Company*, 251 La. 201, 203 So.2d 548 (La. 1967). Attempts to contact all of the affected, displaced residents of South Louisiana in order to gain right of entry waivers or to provide them with notice and hearing, or both, before the removal of debris from their property would indeed represent a vain effort on behalf of the local governments and would unduly hamper recovery efforts. Thus, it is our opinion that such measures must be circumvented.

Persuasive legal authority from various jurisdictions around the country exists that support the ability of a governmental entity to bypass the due process requirements of notice and hearing in the wake of a natural disaster. By FEMA's own admission, it is not always possible to obtain the necessary waivers prior to commencing such work. See FEMA, *supra*, at 36. In such instances, FEMA recommends that local authorities document their reasons for not obtaining such waivers. *Id.*

The most notable case that allows for the suspension of due process requirements under emergency circumstances is *North American Cold Storage Co. v. Chicago*, 211 U.S. 306, 29 S.Ct. 101 (1908). In *North*, the Court held that if a public health hazard justifies immediate action, governmental actors can bypass the need for preaction hearings to vet out the interests of the interested parties. Although this decision dealt with movable property, the scenario is analogous to the situation in South Louisiana where the potential threat to public health caused by hazards contained in private property necessitates a quick response that may be hampered in the likely event that the private owners may

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not be servable or even locatable for some time, owing to the circumstances of the hurricane evacuations. Similarly, in *Hall v. McGuigan*, 743 A.2d 1197 (1999), the Delaware Superior Court found that if following due process procedures prior to a taking was impractical due to exigent circumstances, the application of these procedures on a post-hoc basis was sufficient. See also, *Srb v. Board of County Com'rs, Larimer County*, 601 P.2d 1082 (1979). These cases stand for the premise that, even in situations where compensation may be necessary, the notice and comment period may be suspended until after the debris removal or demolition has occurred and the emergency has abated. More to the point, the Ninth Circuit Court of Appeals has stated that, "Summary governmental action taken in emergencies and designed to protect the public health, safety and general welfare does not violate due process." *Armendariz v. Penman*, 31 F.3d 860, 866 (1994). See also, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 299-300, 101 S.Ct. 2352, 2372-73 (1981); *U.S. v. Caltex (Philippines), Inc.*, 344 U.S. 149, 73 S.Ct. 200 (1952); *Customer Co. v. City of Sacramento*, 10 Cal.4th 368 (Cal. 1995); *Miller v. Campbell County, Wyo.*, 722 F.Supp. 687 (D.Wyo. 1989); *Rose v. City of Coalinga*, 190 Cal.App.3d 1627 (Cal.App. 5 Dist. 1987).

Under Title 29, specifically section 727, of the Louisiana Homeland Security and Emergency Assistance and Disaster Act, the parish president has the power to suspend the provisions of any regulatory ordinance if strict compliance with the provisions of any ordinance would in any way prevent, hinder, or delay necessary action in coping with an emergency.¹ Using the powers given to the parish president under Title 29, the governments may suspend notice and hearing requirements found in existing ordinances in order to respond to the immediate need for action and the difficulty in locating property owners in the affected parishes.

The cases noted above clearly provide for a suspension of due process and notice requirements in the event of a natural disaster. Additionally, the states of emergency declared by Governor Blanco further add to the immediacy for rapid responses to public health and safety hazards. In light of the foregoing, and the authority vested in parish presidents via Title 29, in local governments where ordinances exist for right of entry and demolition/debris removal from private property, we recommend that the parish presidents issue an executive order that suspends notice and due process rights related to these matters. We caution that such a suspension should be narrowly tailored to meet the immediate needs of the Hurricane Katrina and Rita recovery and that it should be set to expire within a reasonable time.

¹ Similar power exists for municipal chief executive officers under La. R.S. 29:737.

Compliance with Historic Preservation Laws

History-related tourism is the lifeblood of many South Louisiana communities. During the reconstruction process it is incumbent upon the local governments to ensure the protection of historic and archaeological resources for future research and education as well as to help bring tourists back to our area once we have recovered from this disaster. Despite the power of certain local governments to suspend their local historic preservation ordinances in order to “expedite” the recovery process, this does not eliminate the requirement that these entities must continue to comply with state and federal preservation laws and regulations.

Section 106 of the National Historic preservation Act (16 USC 470f) requires FEMA, in consultation with the State Historic Preservation Office, to identify properties eligible for or listed on the National Register of Historic Places (NRHP) and to adequately consider the effect of any FEMA funded undertaking, including potential demolition of private and public property, on identified historic properties. FEMA’s historic preservation responsibilities must be fulfilled before FEMA funded activities can be initiated. If an applicant for FEMA assistance proceeds with an undertaking before FEMA satisfied these requirements, FEMA funding may be jeopardized. Therefore, it is the opinion of this Office that local governments should not summarily suspend or abolish their local historic preservation boards or commissions. Rather, in order to expedite the notice and hearing process associated with how to deal with badly damaged historic properties, we would suggest issuing an ordinance or proclamation that streamlines this process. This approach is more prudent than eliminating the process altogether, and thereby potentially jeopardizing FEMA reimbursement funding if a NRHP eligible structure or site is damaged or altered in the cleanup process.

Opinion Summary

As we noted at the beginning of this opinion, we are faced with a real tension in the aftermath of these storms: One the one hand, there is an obligation to protect the due process rights of the individuals in the affected areas while, on the other hand, the State and its political subdivisions *must* be able to move forward with the rebuilding process in order to make South Louisiana habitable and economically viable again. In light of this tension, we believe that the foregoing analysis provides a solution that walks the fine line between the competing interests of due process and recovery. This analysis is summarized as follows:

- (1) Power does exist for local governments to enter private land for demolition and debris removal in an emergency situation. This power is granted by the Louisiana Constitution and a line of court cases, including authority from the United States Supreme Court.

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- (2) If no local ordinances exist to allow for demolition and debris removal in emergency situations, such authority must be created. This may be accomplished by an order from the local governing executive or by the passing of new ordinances. If such authority must be created by the political subdivisions, we suggest that it be done without including the usual delays for notice and hearing that typically accompany condemnation/demolition laws. This will expedite the cleanup and recovery process. We caution that any such authority should be narrowly tailored to exist only for the purposes of these disasters so as not to threaten the due process rights of the populace after the emergency has abated.
- (3) If local ordinances do exist to allow for demolition and debris removal in emergency situations, then the local authorities, under the analysis contained herein, have the power to bypass the typical due process protections in the interest of saving their communities from hazards, disease, and economic devastation.
- (4) Relaxing due process requirements under exigent circumstances does not run afoul of FEMA guidelines and requirements.
- (5) Once the emergency situation abates, the typical due process requirements for condemnation and demolition return to normal.
- (6) This opinion does not serve as a guarantee that the political subdivisions will not be sued by their citizens at a later date for compensation for the taking that is the demolition of their property. We leave the outcome of these situations to the courts to decide.
- (7) Political subdivisions *must* remain in compliance with local, state, and federal historic preservation laws and rules. Failure to do so may result in jeopardizing reimbursement funds from FEMA and will certainly deal a substantial blow to the economy of South Louisiana when the cleanup process is complete.

In short, we believe that the law is flexible enough to incorporate the suspension of due process for the greater good of the people of South Louisiana. This State is in dire need of fast action to recover from Hurricanes Katrina and Rita. The health and safety of the people depend on the ability of the government to use its vast resources to accomplish the cleanup, even if that means demolishing some structures without providing typical notice and comment period to the private owners. Additionally, to ensure the health and wellbeing of the people of South Louisiana as well as this region's economy, the government must be able to act as quickly as possible in abating the threats to their communities. Only then will

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we be able to see South Louisiana recover from these horrible tragedies. However, one thing must be kept in mind in light of this opinion: The due process suspensions discussed herein are not a granting of carte blanche authority for political subdivisions to run roughshod over individuals' due process rights. Rather they are necessary moves to save a state. Any actions done by the political subdivisions must be done in the utmost good faith or the political subdivisions will doubtless be answerable for a plethora of lawsuits following their actions and they may, indeed, jeopardize their FEMA reimbursements for these actions.

We hope this sufficiently answers your inquiry, however if we may be of further assistance please do not hesitate to contact our office.

Sincerely yours,

CHARLES C. FOTI, JR.
ATTORNEY GENERAL

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DATE REQUESTED: October 13, 2005

DATE RELEASED: **October 20, 2005**

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