

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NUMBER:

DIVISION:

**MANDY KIRK, ANNETTE DENSON, GRETA A. GLADNEY, HOPE HOUSE,
RAYMOND PARKER, JR., LOWER NINTH WARD NEIGHBORHOOD COUNCIL,
NEW LIFE INTRACOASTAL COMMUNITY DEVELOPMENT CORPORATION,
PEOPLES HURRICANE RELIEF FUND, AND LOUISIANA ACORN, PETITIONERS**

VERSUS

**CITY OF NEW ORLEANS AND RAY NAGIN,
DEFENDANTS**

Filed: _____ **Deputy Clerk** _____

MEMORANDUM IN SUPPORT OF INJUNCTIVE AND DECLARATORY RELIEF

This memorandum of law outlines why the impending demolition of 2500 homes by the City of New Orleans should be immediately stopped and enjoined as violating the US and Louisiana Constitutions. The demolitions also violate the City's own declarations about the categorizing of homes. All demolitions must cease until and unless the City of New Orleans follows due process of law.

INTRODUCTION

Greg Meffert, on behalf of the City of New Orleans, announced in the Times-Picayune on December 24, 2005 that "about 2500" homes in the City "will be demolished immediately" because after an initial inspection they pose an imminent public hazard. The City reported another 3000 homes would be inspected a second time to verify they must be torn down.

DEMOLITIONS VIOLATE CITY RULES AND REGULATIONS

In addition to the violations of the US and Louisiana Constitutions, which are discussed later in this memorandum, the City plan to demolish thousands of homes and buildings violates their own stated rules and regulations.

The City has announced the immediate demolition of 2500 homes despite explicit promises to homeowners.

The City has posted on the Internet the following: City of New Orleans Expedited Permit Process: <http://www.cityofno.com/portal.aspx?portal=1&tabid=54> The City states there:

"As you return to your home in the aftermath of Hurricane Katrina, please make note of the following procedures the City of New Orleans has implemented to advise and assist property owners in the New Orleans area of what steps to take if a home flooded or sustained damage from Hurricane Katrina. The City of New Orleans will continue to work with citizens and property owners to help expedite permitting and inspections on damaged properties in all

possible cases. For more information contact the City of New Orleans information line at (877) 286-6431 or the Department of Safety & Permits at (504) 658-7100.

“The City of New Orleans has streamlined our permitting requirements in order to expedite the recovery process. Most permits can be issued online or over the counter at the Safety and Permits offices. Permit requirements will be based on where the property is located and the damage it sustained from the storms. Each structure has been or will be reviewed by Safety & Permits officials to determine the level of damage. Please use the guidelines below to determine what the next steps to take are for your individual property.

“Damage Inspection Notices

GREEN: Building is safe to enter and lawful occupancy permitted.

YELLOW: Building has partial structural damage and/or falling non-structural hazards may be present. Building may or may not be habitable; partial occupancy is permitted per noted restrictions.

RED: Building is unsafe to enter and its occupancy has been prohibited by the local building department. The building is structurally unstable and may possibly collapse from static conditions, wind, or other events.

“The stickers do not represent whether or not a building will be demolished. Demolition will be determined through a separate process between the City and the home owner.” [Emphasis is on City website].

..... [Later on same site]

“Q: Why do some homes have yellow and red stickers on them? Are green stickers being posted?

“A: No green stickers are being posted on buildings. Homes which have been inspected and are deemed safe warrant a green designation, however, this information is only being recorded electronically through the City’s home inspection program.

“Homes which have been flooded and have a special safety hazard have been “tagged” with either a yellow or red 5-1/2” x 8-1/2” City of New Orleans Department of Safety and Permits sticker.

“A yellow sticker means that the building has partial structural damage and/or a falling non-structural hazard may be present. Only some yellow stickers are being posted; the vast majority of homes designated as yellow have been flooded but do not have structural damage, therefore a sticker is not required.

“Under a yellow, partial structural damage has occurred to only a relatively small portion of the building; the majority of the building is still structurally stable. An example is a home where the roof gable is damaged at one end, but rest of building is okay. Examples of non-structural hazards include leaning porch roofs/canopies with damaged supports, light trees or well supported trees leaning on homes, loose cladding which can fall from a significant height, etc.

“A red sticker means that the building is unsafe to enter or occupy due to a serious structural deficiency and/or the presence of a significant life threatening hazard, such as a large tree which is leaning towards a house or a downed live electrical line. Significant structural damage may possibly lead to building collapse and is therefore unsafe to enter or occupy.

The yellow and red stickers are meant to warn residents of potential safety hazards on their properties and to inform them whether or not it is safe to enter or occupy their homes.

“The stickers do not represent whether or not a building will be demolished. Demolition will be determined through a separate process between the City and the home owner.” [Emphasis on the City of New Orleans website].

“Q: Who will decide whether my home is to be demolished?”

“A: Parish officials said that in most cases property owners will decide. Professional building inspectors will evaluate each property and report to the Parish Council and administrators, who will recommend to the owner whether the property should be demolished. All demolition will require permission from the property owner, unless an owner is negligent in responding to attempts to reach the owner. Owners will not have to wait for the inspection to start rebuilding, but must obtain necessary permits. [Emphasis supplied by undersigned].

Needless to say, the New Orleans City Council has not received these evaluations and recommendations nor have the homeowners. Permission has not been sought nor granted. No administrative or legal proceedings have been initiated.

No homeowners have been given any legal process at all, much less constitutionally required due process.

THERE IS NO STATUTORY AUTHORITY FOR UNILATERAL DEMOLITION AFTER INSPECTION BY PRIVATE CONTRACTORS

There is no provision in City or State law which allows unilateral demolition of property after inspection by private contractors without consent of owners or without due process hearings. Indeed demolition, because it is such a serious action, as a matter of law, almost always takes places only with permission or after inspection, notice to owner, an opportunity for a hearing with legal counsel, a decision by an impartial arbiter, and opportunity for an appeal. Because there is no precise statutory authorization for unilateral demolition without due process, the demolitions must be halted until due process protections are fulfilled.

UNILATERAL DEMOLITION OF THOUSANDS OF HOMES CANNOT GO FORWARD UNDER UNILATERAL DECISIONS BY DEFENDANTS BASED ON INSPECTIONS BY PRIVATE CONTRACTORS THAT THOUSANDS OF “EMERGENCIES” EXIST ON PROPERTIES THAT HAVE BEEN IN SUCH CONDITION FOR FOUR MONTHS

As a matter of law, the defendants cannot now, after these homes have been standing for

four months, declare that thousands of homes are in such condition that “emergencies” exist that would suspend the protections of the Louisiana and US Constitutions.

DEMOLITION OF THOUSANDS OF HOMES WITHOUT CONSENT, NOTICE OR HEARING VIOLATES THE U.S. CONSTITUTION

Apart from the City violating its own stated rules, the Fifth and Fourteenth Amendments to the U.S. Constitution prohibit the taking of property without due process of law. There can be no disputing that the announcement that the City will begin “immediately” to demolish the homes of approximately 2500 families constitutes a taking of their property.

The Fourteenth Amendment prohibits the government from depriving “any person of life, liberty, or property, without due process of law.” [U.S. Const. amend. XIV](#). This guarantee affords procedural protections. [Daniels v. Williams, 474 U.S. 327, 331-32, 106 S.Ct. 662, 88 L.Ed.2d 662 \(1986\)](#). The government must give reasonable notice to an individual of its intention to deprive him of life, liberty, or property. [Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-15, 70 S.Ct. 652, 94 L.Ed. 865 \(1950\)](#). It also must provide him with a meaningful opportunity to be heard. [Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 \(1976\)](#); [Mullane, 339 U.S. at 313-14, 70 S.Ct. 652](#). “Following Mathews, we assess what process is due by considering and balancing three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [Mathews, 424 U.S. at 335, 96 S.Ct. 893](#). This approach reflects the fact that “due process is flexible and calls for such procedural protections as the particular situation demands.” [Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 \(1972\)](#); accord [Faulder v. Texas Bd. of Pardons & Paroles, 178 F.3d 343, 345 \(5th Cir.\)](#) (per curiam) (“Procedural due process is an inherently flexible concept.”), cert. denied, [527 U.S. 1017, 119 S.Ct. 2362, 144 L.Ed.2d 767 \(1999\)](#). Applying the three-factor Mathews test, we usually hold that the individual must be heard prior to the deprivation. See [Zinermon v. Burch, 494 U.S. 113, 127-28, 110 S.Ct. 975, 984, 108 L.Ed.2d 100 \(1990\)](#). However, when pre-deprivation procedural safeguards cannot be expected to protect against the type of deprivation involved, we find that a post-deprivation hearing satisfies due process. See [id. at 128-30, 139, 110 S.Ct. at 984-85, 990](#).

The basics of due process are simply summarized by Professors Rotunda and Nowak in their TREATISE ON CONSTITUTIONAL LAW: Substance and Procedure, Third Edition, Volume 3, Chapter 17.8, page 87 as follows: “The essential elements of due process are: (1) adequate notice of the charge or basis for governmental action; (2) a neutral decision maker; (3) an opportunity to make an oral presentation to the decision-maker; (4) an opportunity to present evidence or witnesses to the decision-maker; (5) a chance to confront and cross-examine witnesses or evidence to be used against the individual; (6) the right to have an attorney present

the individual's case to the decision-maker; (7) a decision based on the record with a statement of reasons for the decision.”

The City has not sought permission or initiated any legal proceedings at all for people whose property is subject to the immediate demolition by the City. The City argues that it has the right to demolish these properties without any pre-demolition hearing because private contractors have determined them to pose an imminent public hazard. Despite the fact that many of these properties have been in the same condition for approximately four months, the City offers no reason to ignore the due process rights of the Constitution.

There is no doubt that hundreds of properties in the City of New Orleans will have to be demolished.

However, as the City recognizes on its own website, the City of New Orleans need either the permission of the property owner to demolish their home or to comply with due process before destroying anyone's home. Good intentions by the City are not sufficient.

Over 130 years ago, the U.S. Supreme Court ruled that good intentions by a city do not entitle it to exempt itself from the due process requirements of the Constitution. [Yates v. Milwaukee, 10 Wall. 497, 77 U.S. 497, 505, 19 L.Ed. 984 \(1870\):](#)

“It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself.” Other courts have agreed, again for over 100 years. [Hennessy v. St. Paul, 37 F. 565, 566 \(C.C.D.Minn.1889\):](#) “[U]nless a nuisance, as defined by the common law or by statute, exists, the act of the common council cannot make it one by a mere resolution. Such a doctrine might place the property of the people, no matter what in fact might be its real condition and character, at the disposal of the common council, without compensation.”

Numerous similar cases on this matter are collected at 14 A.L.R.2d 73, “Constitutional Rights of Owner As Against Destruction of Building by Public Authorities.” For example, “Although it is elementary that an owner of property has no constitutional right to maintain it as a public nuisance, it is equally elementary that he has a clear constitutional right to have it determined by due process whether in fact and law it is such a nuisance. As against this right, no ex parte declaration, however formal, by municipal authorities that it is a nuisance is final against him. It is said that even at common law a city or town has power to abate a public nuisance. Usually it has statutory power, vested in its governing body, to declare and abate public nuisances. But neither at common law nor under such express power can it, by its mere declaration that specified property is a nuisance, make it one when in fact it is not.”

Cases cited in the ALR annotation include:

“Where building was administratively determined to constitute danger to life and health, and order directing owner to commence demolition or to secure building within 24 hours was served by posting on subject building and by mailing to owner, building was taken and demolished without owner being given adequate notice and reasonable opportunity to be heard,

and procedure followed by city was flagrant violation of due process of law, absent emergency situation.” [New York v Unsafe Bldg. & Structure, 77 Misc 2d 562, 354 NYS2d 278.](#)

”An officer who destroys private property in abating what legislative or administrative officials have determined to be public nuisance does so at his peril, absent prior judicial determination that the property is nuisance or an opportunity given to owner for administrative hearing with judicial review.” [Solly v Toledo, 7 Ohio St 2d 16, 36 Ohio Ops 2d 9, 218 NE2d 463](#) (citing annotation).

“Where municipal corporation razed building, claiming it constituted public nuisance, without first giving owner thereof notice of such intent and full opportunity for administrative hearing, burden is upon municipal corporation to prove that building constituted public nuisance and that razing thereof was reasonably necessary to abate such nuisance.” [Jackson v Columbus, 41 Ohio App 2d 90, 70 Ohio Ops 2d 92, 322 NE2d 283.](#)

“Municipal ordinance which was part of zoning code and declared any service station continuously vacant for period of six months to be public nuisance and provided for its destruction without first allowing hearing to owner of property was unreasonable, arbitrary, and unconstitutional as depriving owner of property without due process of law. [Marathon Oil Co. v Bd. of Zoning Adjustment, 44 Ohio App 2d 402, 73 Ohio Ops 2d 525, 339 NE2d 856.](#)

“Owners are entitled to judicial determination of question whether their properties are in fact public nuisances.” [State ex rel. Schulman v Cleveland \(CP\) 8 Ohio Misc 1, 37 Ohio Ops 2d 12, 220 NE2d 386](#) (citing annotation).

The actions and inactions of defendants violate the due process guarantees of the US Constitution.

DEMOLITION OF THOUSANDS OF HOMES WITHOUT CONSENT, NOTICE OR HEARING VIOLATES THE LOUISIANA CONSTITUTION

[Mongogna v. O'Dwyer, 204 La. 1030, 16 So.2d 829, 833, La. 194](#) (December 13, 1943):
“The essential elements of due process of law are notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case.”

The actions of the City also violate the Louisiana Constitution, Article 1, Sections 2 and 4(b).

Article 1, Section 2 says: No person shall be deprived of life, liberty or property, except by due process of law.”

Article 1, Section 4(b) says: “Property shall not be taken or damaged by the state or its political subdivisions except for public purposes with just compensation paid to the owner or into court for his benefit. Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question. In every expropriation, a party has the right to trial by jury to determine compensation, and the owner shall be compensated to the full extent of the loss.”

All the demolitions without consent, notice or hearing violate the express provisions of the Louisiana Constitution.

CONCLUSION

The temporary restraining order and preliminary and permanent injunctions and declaratory relief needs to be issued to protect not only the 2500 homes of citizens of New Orleans but the US and Louisiana Constitutions and the due process of law they require.

Respectfully submitted,

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