LIFE AFTER DISASTER: HOW HURRICANE KATRINA DEMONSTRATED THE NEED FOR SHELTER COOPERATIVES

INTRODUCTION

When disaster hits, there is generally little time to react. As a result, any head-time that can be obtained in reaction to an incoming event must be utilized in an effective and purposeful manner. Although not always possible, one of the most direct forms of government action is the evacuation order. Often used in the case of a disaster that allows some foresight, like hurricanes, evacuation orders allow for a more direct effect on the efforts taking people out of harm’s way. But one must ask oneself: are evacuations, even mandatory ones, effective in motivating people to leave their property to take refuge? To answer this question, we must first provide a brief and general overview on the law governing evacuations. We will focus on the applicable law of the United States.

POLICE POWER

The general consensus is that the State, or the Sovereign, is the entity that can validly issue an evacuation order. During bellic encounters, the Sovereign is who wielded the necessary Police Powers to order its citizenry to move out of the warpath. In the case of the United States of America, one of the last times this issue was addressed within a legal context was in Aleutian Livestock Co. v. United States, 119 Ct.Cl. 96 F.Supp. 626 (1951). There the plaintiff was demanding reparations from the government for a number of sheep he had lost as a result of executing an evacuation order. In its Opinion, the Court stated that

Defendant did not take possession of plaintiff's sheep. It only made it impossible for plaintiff to care for them. It did not do this for its own advantage, but only in the interest of public safety. The evacuation order did not apply to plaintiff's employees alone; it was directed to all civilians on Umnak Island. In the opinion of the military authorities it was necessary for security against enemy attack.
Such losses are an incident to the exercise of the sovereign power and duty to protect the people from attack by a hostile power.¹

Particularly in the United States of America, a State’s duty to “protect the people”² is the foundation of what is knows as a state’s police power. This means that, unlike the enumerated and limited powers assigned to the federal government, a state has the general authority to take those necessary steps required to secure the property and life of its citizenry. James Madison highlighted this difference when he wrote that:

The powers delegated by the proposed Constitution to the Federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concerns the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state.³

Moreover, the “[p]olice power is inherent in the sovereignty of every state and is reserved to the states through the Tenth Amendment.”⁴ In essence, a government’s police power allows for it to address a particular circumstance using those measures that are legal and adequate. Under the pressures of an emergency situation, a state’s police power is amplified, allowing the sovereign to take certain actions that otherwise would lie beyond its grasp.⁵ The reasoning behind such exceptions is usually the pursuit of public safety.⁶ This also serves as the basis of a government’s ability to declare a mandatory evacuation order.⁷ As a result, whatever organism that wields such power is in fact the proper entity to emit an evacuation order.

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¹ Aleutian Livestock Co. v. United States, 119 Ct. Cl. 326, 343, 96 F. Supp. 626, 628 (1951)
² Id. Aleutian Livestock Co. v. United States, 119 Ct. Cl. 326, 343, 96 F. Supp. 626, 628 (1951)
³ The Federalist No. 45 (James Madison)
⁵ Id.
⁶ Id.
⁷ Id.
THE EVACUATION ORDER

The first step in determining if an evacuation order can be emitted is considering if the required *police power* has been delegated. As mentioned before, in the case of a State, the Tenth Amendment provides assurance. However, such an analysis becomes a requirement in the case of smaller and more concentrated bodies of government, i.e., counties, municipalities, parishes, etc. Delegation of state power can take place in an express or implied manner. In the case of an *express delegation*,

The police power may be delegated by statute, through charter, or even, when authorized by the legislature, through an administrative or executive order. North Carolina, for example, has expressly delegated the emergency police power to municipalities by statute. The North Carolina Supreme Court has confirmed that this statute delegates the state's police power. This delegation is in addition to the powers conferred through North Carolina's home rule statute.\(^8\)

On the other hand, an *implied delegation* of police power “...may occur through so-called general welfare clauses in a statute or charter. It may be found in home rule statutes as well.”\(^9\)

One example of this is the state of Florida and its relationship with it's counties: “The legislative and governing body of a county shall have the power to carry on county government.”\(^10\) Some authors have pointed out that “The power to carry on county government must include enough power to discharge innate responsibilities, such as acting decisively to safeguard the lives and property of the county's citizens.”\(^11\) The aforementioned logic allows us to conclude that

The police power is a source of power available to local governments under which, in an emergency situation, they may take extraordinary action to protect the public. The police power is delegated by the state, either expressly or through some grant of power allowing the local government to act in furtherance

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9 Id.
10 Fla. Stat. Ann. § 125.01
of the general welfare. Unless otherwise preempted, local governments have broad discretion in exercising the police power.\textsuperscript{12}

Once the proper authority with police powers is identified, a valid evacuation order can be emitted in the event of a disastrous circumstance.\textsuperscript{13}

\textbf{IDENTIFYING A DISASTER}

Another requirement for an evacuation order to be issued is that a state of “disaster” or “emergency” must be present in order to justify such a drastic measure. Although both may allow for the sovereign to use its police power, there are differences between the two. The main distinction between the two is the immediacy of the situation: an emergency usually refers to a sort of threat or hyper sensitivity, while a disaster will usually describe a current state of severe damage to life or property.

For the most part, the definitions of an emergency contained within the statutory schemes are similar in that they refer to either actual or threatened conditions posing potential injury or harm to life or property as the result of a disaster. Most states define a disaster within terms of either natural or [man-made]. Some statutory schemes attempt to identify potential disasters such as flood, fire, or tornado. Other definitions of disaster speak in general terms of occurrences in which there is widespread or severe damage, injury, or loss of life or property resulting from any natural cause or cause of human origin.\textsuperscript{14}

Put simply, if there is reason to anticipate danger to life or property, a state of emergency would most probably be declared. On the other hand, a state of disaster would most likely be declared when such damage has already been inflicted. Of course, not all damaging events would be identified as such. The event must be of such severity that it would merit use of the state’s police powers.\textsuperscript{15} However, once such a situation arises, the sovereign is expected to

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\item \textsuperscript{13} For a general overview on what could be considered a disaster, and the differences between a disaster and an emergency, see generally: Howard D. Swanson, \textit{The Delicate Art of Practicing Municipal Law Under Conditions of Hell and High Water}, 76 N.D.L. Rev. 487 (200)
\item \textsuperscript{14} Howard D. Swanson, \textit{The Delicate Art of Practicing Municipal Law Under Conditions of Hell and High Water}, 76 N.D.L. Rev. 487, 491-492 (200)
\item \textsuperscript{15} The following types of events, occurrences, or conditions may warrant the declaration of an emergency or disaster: fire, flood, tornado, hurricane, accident, chemical or petroleum spill, radiological release, landslide, mudslide, existence of
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step in and utilize its general police power to take those measures needed to secure life and property. It’s at this point in time that the state can suspend or limit a person’s fundamental rights, representing “…the most extreme use of the [police] power.”

**EVACUATION ORDERS**

Once a declaration has been issued by the proper authority, the types of orders authorized may depend upon the provisions of the declaration if limited or otherwise will depend upon the statutory or home rule authority under which the proclamation was issued. In some instances a declaration may actually include the issuance of specified orders. However, the most common approach appears to have the appropriate official issue orders apart from the declaration. The most common forms of authority exercised and orders issued pursuant to an emergency declaration include: […] Issuance of evacuation orders of buildings, streets, neighborhoods, and cities...

As we can see, once a highly perilous situation is present, the proper government authority is now enabled to utilize its police power to emit an evacuation order. However, other non-legal considerations might constrain the willingness of utilizing such power.

Mandatory evacuation orders necessitate confronting a series of policy questions to which virtually no attention has been given: What are the legal and ethical foundations of mandatory evacuation orders, given the fact that those who fail to leave their homes endanger primarily themselves, not other people? What level of coercive authority ought to be applied to those who fail to comply? Should penalties be sought in such cases? What duties of rescue, if any, do public officials bear for those who resist orders of evacuation? When there are such orders, what obligations does the government have to provide effective means for residents to leave safely?

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17 Id.
18 Howard D. Swanson, *The Delicate Art of Practicing Municipal Law Under Conditions of Hell and High Water*, 76 N.D.L. Rev. 487, 494-495 (200)
As we can see, evacuation orders have a ripple effect manifested in a wide array of practical considerations. In addition, not all sectors of society have an equal ability to absorb the impact; some areas could contain a population constrained by physical and/or economic limitations. Hurricane Katrina provides us with a clear example:

Hurricane Katrina had varying impacts on the population. CRS [Congressional Research Service] estimates that of the people most likely to have been displaced by the hurricane, about half lived in New Orleans. Due to the city’s social and economic composition, the storm impacted heavily on the poor and African Americans. CRS estimates that one-fifth of those displaced by the storm were likely to have been poor, and 30% had incomes that were below 1½ times the poverty line. African Americans are estimated to have accounted for approximately 44% of the storm victims. An estimated 88,000 elderly persons (age 65 and older), many with strong community ties, may have been displaced, along with 183,000 children, many of whom were just starting the school year when the storm struck.\(^{20}\)

Without a doubt, one of the most affected populations was that of the most economically constrained.

Katrina struck in the very last days of August, when those living check-to-check were running out of their bi-weekly of monthly allotments. Tens of thousands didn’t have cars. Even many who did may not have been able to shoulder the costs of evacuation; the average cost for three days for a family of four, including lodging, food, and transportation, could easily exceed a thousand dollars. For poor neighborhoods like the Lower Ninth Ward, one of the city’s lowest lying areas, this was an impossible sum, though they had an alternative in the Superdome, the city’s “refuge of last resort.” Nearly 100,000 New Orleanians either couldn’t or didn’t comply with Mayor Nagin’s evacuation order.\(^{21}\)

For this population, something as simple as the date of the evacuation order’s emission became a major factor in their ability to comply. Hurricane Katrina is a prime example of how an unexpected event such as an evacuation order can entail a variety economic and logistic obstacles that for some can prove too much of a burden. Simply put, evacuations are not a light subject. They entail the displacement of many people at the same time; sometimes in the

\(^{20}\) Thomas Gabe et al., Cong. Research Serv., RL33141, Hurricane Katrina: Social-Demographic Characteristics of Impacted Areas 2 (Summary) (2005)
\(^{21}\) Daniel A. Farber & Jim Cohen, Disaster Law and Policy 8 (3rd ed. 2015)
thousands. This is no easy feat for the government, much less the people affected. In essence, an evacuation order is a total disruption of a person's routine, altering their sense of normalcy. Although foreign for those who have not experienced the process of an evacuation, minimal effort is required to imagine the discomfort this would most certainly provoke. Setting aside the obvious hesitance off leaving personal property unattended, an evacuated individual also needs to handle the logistics: identifying a shelter, choosing what to take and what to leave behind, not to mention the implications of acquiring transport.

That said, its not unusual for those segments of the population with the means to mobilize and evacuate before a formal order is issued. Again Hurricane Katrina provides us with an example:

On Saturday, a day before New Orleans Mayor Ray Nagin would order the first mandatory evacuation on New Orleans in the city’s history, city residents had begun to evacuate using a system known as contraflow, which converts incoming highway lanes to outbound to expedite evacuation. More than a million residents of southeastern Louisiana left the area in just over 24 hours...\textsuperscript{22}

Once Hurricane Katrina’s wrath had passed, an estimated 700,000 people were acutely impacted;\textsuperscript{23} of which about 270,000 were evacuees.\textsuperscript{24} Although everyone in Katrina’s path received a heavy dose of punishment, it was poor communities who suffered the most.

Hurricane Katrina disproportionately impacted communities where the poor and minorities, mostly African-Americans, resided. The three states where communities were damaged or flooded by the hurricane rank among the poorest in the nation. According to the 2000 Census, Mississippi ranked second only to the District of Columbia in its poverty rate; Louisiana was right behind it ranking third, and Alabama ranked sixth. [The Congressional Research Service] estimates that about one-fifth of the population most directly impacted by the storm was poor. That poverty rate (21%) was well above the national poverty rate of 12.4% recorded in the 2000 Census.\textsuperscript{25}

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\textsuperscript{22} Daniel A. Farber & Jim Cohen, Disaster Law and Policy 8 (3rd ed. 2015) \\
\textsuperscript{23} Thomas Gabe et al., Cong. Research Serv., RL33141, Hurricane Katrina: Social-Demographic Characteristics of Impacted Areas, 14 (2005) \\
\textsuperscript{24} \textit{Id.} \\
\textsuperscript{25} \textit{Id.}
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THE PROBLEM (IN A NUTSHELL)

If we take into consideration the possible reasons for a person not to follow an evacuation, the majority seem to have two characteristics in common: 1) unforeseen costs of “living on the road”, and 2) the absence of support for those individuals who are now confronting a novel situation. Because of their economic limitations, and the fact that they were disproportionately affected by Katrina’s presence, the poorest communities suffered dual punishment: at the same time that they were the population that had the most to gain from successfully following an evacuation order, they were also the least able to do so. A considerable amount of those affected simply were not able to absorb the economic and logistical blow. Their poverty, coupled with the expenses that naturally related to the unforeseen expense that is an evacuation, could in fact serve as a life-threatening obstacle. Also, some sections of the population decided to ignore the evacuation order because they were sure that Katrina, as had happened with other meteorological events, could be endured without grave losses.

Gulf Coast residents call it “hurricane roulette”. Some who had endured 1969’s Category 5 Hurricane Camille, the region’s benchmark for catastrophic storms, thought that no other storm could come close. But Katrina ended lifetimes of successful storm-dodging. As Biloxi city spokesperson Vincent Creel said of Camille survivors lulled into a false sense of security, Hurricane Camille killed more people in 2005 than it did in 1969.26

We believe that individuals might be less inclined to take such a risk if it were not for the costs and implications related to the implementation of an evacuation order. This assumption lies heavily on the premise that people are aware that they are exposed to real danger in the face of such an event as is a hurricane. Even if some people decide to distrust certain sources of information, be it public or private broadcasting, media coverage of an impending threat does, at the very least, provide a perceivable indicator as to the increase of risk, i.e., there is a clear

and present danger. This conclusion could be further supported by the fact that the Sovereign runs the risk of being held liable in the case that it uses its police power unnecessarily. “When the threat is not so apparent, however, the exercise of the police power may expose a local government to liability. When measures seem disproportionate to the threat, courts have found the exercise of police power to constitute a compensable taking.”  

Another important consideration is how large government organisms could realistically adapt to the particular needs of the disabled. One only need to consider the sheer expenditure of resources required in the logistics alone. For example, FEMA, in addition to only serving as support for states, operates in consideration of broad objectives, not particulars.

Since 1979, when the agency was first established, FEMA has been charged with carrying out activities that enable the federal, state, and local governments to address a broad spectrum of emergency management functions. In carrying out its mission, FEMA has (1) funded and coordinated emergency preparedness activities, (2) provided and coordinated immediate federal response to save lives and property, (3) funded the reconstruction of damaged homes and infrastructure to help stricken families and communities recover, and (4) supported hazard mitigation activities to ensure that future disasters do not recur, or are less destructive in the future. These four elements of preparedness, response, recovery, and hazard mitigation constitute what has been generally referred to as the comprehensive emergency management (CEM) system.

Again, in the case of the United States of North America, as stated above, it is each federalized state’s government who is endowed with general police power. However, when it comes to the subject of evacuations, like in the case of Hurricane Katrina, sometimes local governments do not have the ability to cope with the logistical strains.

[S]tate and local governments in the areas most affected by the hurricanes were not adequately prepared [...] and lacked the necessary information about temporary housing. Shelters of last resort, designed for people to take refuge in the immediate hours before and after landfall (such as the Superdome), were not of sufficient capacity. Instead, the Superdome, itself located in a floodplain, had to bear a burden for which it was not prepared. The New Orleans Convention

Centre, never planned as a shelter, became one out of sheer necessity and improvisation.28

Sometimes these two, the state and the federal government, have difficulties in providing for the needs of an affected community. Such inabilities became apparent during Hurricane Katrina.

Though the Federal Emergency Management Agency (FEMA) positioned resources in the area before the start of the hurricane season, the food and water -critical supplies when a disaster has disrupted local services- were insufficient. Mississippi received only a fifth of the water and ice that state officials estimated was necessary; shipments didn’t meet demand in Mississippi until September 9, 12 days after landfall. FEMA, the federal government’s primary disaster-response agency, had no effective supply-tracking system, so replenishing provisions turned out to be complicated. Planning and coordination were so poor that truck drivers didn’t know where to go, and emergency-management officials didn’t know what was en route, or when it might show up. Phone lines were down, so it was hard to clarify.29

Perhaps we ask too much from our governments when we expect them to have the forethought to consider that some communities will require special care. If we have learned anything from large scale disasters such as Hurricane Katrina, its that governments have limitations, and at times can fail to provide for the communities they are supposed to protect. And yet, certain people could still decide to play “hurricane roulette” due to the vicissitudes that are intertwined with the act of evacuating. How then can such a situation be avoided? What mechanisms could be put in place to serve as an incentive to heed an evacuation order? How could the act of evacuation be presented in a less cumbersome and expensive way? Enter the Shelter Cooperative.

**COOPERATIVISM**

Cooperatives are by no means a new form of business organization. In 1844 a group of 28 weavers “[s]purred on by having been relieved of their jobs by their local manufacturing

28 Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina, 109th Cong., A Failure of Initiative 311 (Comm. Print 2006)
company […] pooled 140 British pounds and began purchasing oatmeal, sugar, butter and flour.”

Although not the first example of a cooperative venture, most authors concede that this group of artisans, known as the Rochdale Society of Equitable Pioneers, set the foundation for the seven basic principles of modern day cooperativism: 1) voluntary and open membership, 2) democratic member control, 3) member economic participation, 4) autonomy and independence, 5) education and training, 6) cooperation among cooperatives, and 7) concern for community. Of the seven, the principle of democratic control is the most important in the identification of a cooperative enterprise. Broadly defined, democratic control is when “…all of the cooperative’s members vote in matters concerning the cooperative in a one-member/one-vote basis.” However, this is not the only characteristic that sets the cooperative enterprise apart from other common forms of business. Unlike hierarchical enterprises, a cooperative has the following distinctions:

(1) It is owned and controlled by the people who use its services and buy its products [owner/customers]; (2) its primary focus is to provide its services or goods to its owner/customers and not the general public; (3) it is democratically controlled by its owner/customers, and each owner/customer has one vote regardless of the amount of services or products it purchases from the cooperative; and (4) the primary objective of the cooperative is to maximize benefits to its owner/customers rather than profits.

Of all the positive aspects enumerated above, the most important for this article is the fact that a cooperative is owned by the very people that will eventually consume its product or services. This is a crucial and fundamental difference between cooperatives and other enterprises, and is the main reason why we believe it would be the most effective at providing for a proper and accurate evacuation service. Most scholars will agree that the absence of

30 RICHARD C. WILLIAMS, THE COOPERATIVE MOVEMENT: GLOBALIZATION FROM BELOW 10 (David Crowther ed. 2016)
such a principle will strip away any possibility of an enterprise to be considered a cooperative
due to the fact that "[a] cooperative is an association which furnishes and economic service
without entrepreneur profit and which is owned and controlled on a substantially equal basis
by those for whom the association is rendering service." 34 Although this might be a general
description of what a cooperative is, it highlights the fundamental motivation behind the
creation of a cooperative enterprise: the cooperative serves its constituency. Generally, as
economic institutions, cooperatives do not have charitable objectives. Instead, its "...designed
to further the economic interests or welfare of its members." 35 That said, the phrase "economic
welfare" requires some clearing up due to the wide array of connotations it can arouse. For
our purposes, and within cooperativism as a whole, economic welfare stretches far beyond
mere dollars and cents.

Economic welfare does not merely refer to financial savings or increased
monetary returns. It cuts much deeper and takes into consideration basic
aspects of economic life. Quality of product, decency of service, ownership,
control and satisfaction of self-help are important benefits of cooperatives and
sometimes are even more important than the direct financial benefits. 36

By having democratic control of the cooperative, its membership can reap the benefits
provided by it. Also, it is our contention that, instead of relying on the state government to take
the appropriate steps to preserve the safety of displaced communities, it is these very
communities who should take matters into their own hands. Who better to preserve their well-
being than the very people who live in potentially affected areas? As mentioned before, a
whole array of considerations intervenes when considering and evaluating the benefits
received from the cooperative. In fact, a cooperative could use its seventh principle, concern
for community, supra, as a basis to evaluate the success of a cooperative’s endeavors. This

34 ISRAEL PACKEL, THE LAW OF COOPERATIVES 2 (1956)
35 ISRAEL PACKEL, THE LAW OF COOPERATIVES 6-7 (1956)
36 ISRAEL PACKEL, THE LAW OF COOPERATIVES 7 (1956)
means that the Shelter Cooperative would be able to use certain considerations that otherwise would not be used in the usual incorporated enterprise or that could be overlooked by large government agencies. These considerations become evermore important when we take into account the wide array of particular needs certain individuals may have.

Nearly half (48%) of all persons age 65 or older living in flooded or damage-affected areas reported having a disability, and over one quarter (26%) reported two or more types of disability. Reported disabilities included sensory disabilities (blindness, deafness, or severe hearing impairment), and other disabilities reflecting conditions lasting more than six months that limit various activities. These activity-limiting disabilities include mental disabilities (difficulty learning, remembering, or concentrating); self-care disabilities (difficulty dressing, bathing, or getting around inside the home); and, going outside disabilities (difficulty going outside the home alone to shop or visit a doctor’s office). An estimated 13% of persons age 65 and older in the flood or damage affected areas reported a self care disability, and 19% of those age 75 and older; one- quarter of those age 65 and older reported a disability that made it difficult to go outside, unassisted, and of those age 75 and older, one-third reported such a disability.  

In any case, not all cooperatives are created equal. Although all cooperatives are to observe the cooperative values, certain cooperatives serve some purposes better than others. A few of the most common cooperatives are 1) the consumer cooperative, 2) the marketing cooperative, 3) the workers cooperative and 4) the insurance cooperative. Of the four, we believe that the insurance cooperative is the most apt structure under which to establish a Shelter Cooperative. However, its appropriate to at the very least provide an overview of each one.

**COMMON FORMS OF COOPERATIVE ENTERPRISE**

In the case of the consumer cooperative, the membership pools together its collective resources in order to obtain goods and services that would otherwise be beyond their individual reach. Using a “bread cooperative” as an example, Janelle Orsi explains that “[t]he

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37 Thomas Gabe et al., Cong. Research Serv., RL33141, Hurricane Katrina: Social-Demographic Characteristics of Impacted Areas 17 (2005)
member/owners are people who enjoy eating bread and have formed a cooperative to purchase bread collectively and obtain bulk discounts.”38 Simply put, people form consumer cooperatives so to gain access to certain benefits that they would otherwise not be able to perceive if it were not for their collective efforts. On the other hand, a marketing cooperative could be described as “...any cooperative which [is] utilized in order to help cooperative marketing by persons who produce economic goods.”39 In other words, this type of cooperative is generally formed by a group of individuals who already produce certain goods and services but are not able to adequately reach a consumer base on their own. As a result, they come together to collectively pull together their productive efforts and use the cooperative as a channel through which they can reach a larger consumer base. Again, bread cooperative is used to clarify further: “The member/owners are individual home bread bakers who have formed a cooperative to jointly market their breads. The cooperative may, for example, operate stands at various farmers markets.”40 Another cooperative class is the worker cooperative, or “worker's co-op”. Arguably one of the most well established forms of cooperativism, it “...usually consists of a group of workers who pool resources in order to maintain and operate a plant or productive enterprise in which they work. [...] The word 'workers’ is used in its broad sense so that it includes [any] professional activity.”41 One last time, we adopt Orsi’s bread cooperative as a basis for an example: “The member/owners are workers in a single bakery.”42

39 ISRAEL PACKEL, THE LAW OF COOPERATIVES 18 (1956)
41 ISRAEL PACKEL, THE LAW OF COOPERATIVES 18 (1956)
Finally, the insurance cooperative is, to our understanding, the most appropriate form of cooperativism for the formation of a shelter cooperative. It is very important to have in mind that insurance cooperatives are rarely identified as such. Instead, “[i]nsurance cooperatives are quite generally referred to as mutual insurance companies.”\(^{43}\) (emphasis added) Though widely used, one is hard pressed to find a specific and controlling definition. That said, some jurisprudence can be cited to help us address the question: “what is a mutual insurance company?”. One of the most helpful legal subjects in the task of defining such an organization is tax exemption. In discussing the various instances in which a court has had to decide if an insurer is a “mutual insurance company”, Israel Packel provides us with a general account of a few instances where such a cooperative has had to be defined.

The detailed statutory provisions refer to the insurance cooperatives as mutual insurance companies, but still leave open the question of what constitutes a mutual company. The decisions have been very emphatic in stressing democracy in control as an essential requirement. Thus, in *Keystone Automobile Club Casualty Co. v. Commissioner* [112 F2d 386 (3rd Cir. 1933)], the court denied exemptions to two insurance companies on the ground that they were not democratically owned and controlled. The two insurance companies were elected by a proxy vote cast by the directors of the club. The club directors were elected by members of the club, many of whom were not policyholders. Policy holders who were not members of the club had no right to vote. The court said: “Counsel for petitioners contend that the ‘primary and fundamental characteristic of a mutual insurance company is that it be organized and operated exclusively for the purpose of furnishing insurance at cost to its policyholders.’ This ignores and equally fundamental characteristic of mutual or cooperative organizations – democratic ownership and control.” Of similar import is the following statement in *Ohio Farmers Indemnity Co. v. Commissioner* [108 F2d 665 (6th Cir. 1940)]: “A mutual company is one in which the distinguishing feature is the mutuality of a cooperation of the members united for that purpose, each taking a proportionate part in the management of its affairs and being at once insurer and insured, participating alike in its profits and losses, all its members being policyholders.” […] Three cases\(^{44}\) have gone quite far in denying exemption on the ground that the associations were not operating substantially on a cost basis.

\(^{43}\) ISRAEL PACKEL, THE LAW OF COOPERATIVES 23 (1956)

\(^{44}\) Keystone Mut. Cas. Co. v. Driscoll, 137 F2d 907 (3rd Cir. 1943); Mutual Fire Ins. Co. of Gin. v. United States, 142 F2d 344 (3rd Cir. 1944); American Ins. Co. of Texas v. Thomas, 146 F2d 434 (5th Cir. 1945)
determination of such an issue raises many questions of fact. Obviously, if the organization is being run for the benefit of the original organizer or for a limited group which dominates control by virtue of proxies, there is missing an essential characteristic of a mutual or cooperative association.  

As we can observe, the democratic nature of this kind of enterprise is central when it comes to identifying its cooperative nature. Also, we consider that the court’s reasoning in Keystone Automobile, supra, is particularly enlightening due to how it distinguished the importance of “...furnishing insurance at cost to its policyholders.”, supra, as a main objective of a mutual insurance company. Such a characteristic is particularly appropriate in the case of our proposed Shelter Cooperative due to the limited resources of some individuals living in disaster prone areas. As mentioned above, in the case of Hurricane Katrina, “...one-fifth of those displaced by the storm were likely to have been poor, and 30% had incomes that were below 1½ times the poverty line.” The United States Internal Revenue Service has also done its part in providing some distinguishing characteristics of mutual insurance companies: “While neither the Code nor the regulations thereunder defines a mutual insurance company, the courts have found the following characteristics to be among those indicating a mutual insurance company: 1. the right of policyholders to be members to the exclusion of others and the right of such members to choose the management; 2. the sole business purpose is to supply insurance substantially at cost; 3. the right of members to the return of premiums in excess of those amounts needed to cover losses and expenses; and 4. common equitable ownership of the assets by the members.” As we can observe, although called a “mutual insurance company”, truly it could not be a more cooperative enterprise. It holds at its center the sole purpose of providing affordable risk coverage, by its members, for its members.

45 ISRAEL PACKEL, THE LAW OF COOPERATIVES 315-317 (1956)
46 Thomas Gabe et al., Cong. Research Serv., RL33141, Hurricane Katrina: Social-Demographic Characteristics of Impacted Areas 2 (Summary) (2005)
47 Rev. Rul. 74-196, 1974-1 C.B. 140
THE SHELTER COOPERATIVE’S MISSION

Before going over the inner workings of the shelter cooperative, we believe it necessary to provide a general overview what would be the guiding mission of such an enterprise. As mentioned above, the problem we propose to address is the inability or hesitation of some individuals to follow evacuation orders related to disastrous events. As a matter of fact, in 2006 a select bipartisan committee was assembled to investigate, among other things, the effectiveness of the evacuation efforts that took place during Hurricane Katrina. In its report, it cited various testimonies that highlighted the difficulties faced by those who were not able to follow evacuation instructions.

Some citizens of New Orleans believed that a mandatory evacuation should have been called earlier and that the government needed to assist people to evacuate. New Orleans citizen and evacuee Doreen Keeler testified, “If a mandatory evacuation [order] would have been called sooner, it would have been easier to move seniors out of the area and many lives would have been saved.” She further testified that “[g]oing to [senior citizens] with, yo, this is a mandatory evacuation, you do not have a choice, you have to leave, I feel would definitely help me to get my senior citizens out without waiting as long as I did in order to leave. And I think that if by some miracle there was any type of evacuation plan available, it could have been put into play earlier if a mandatory evacuation had been called.” New Orleans citizen and community leader Dyan French asked: “Why would you get in the public media and ask a city, where 80 percent of its citizens ride public transit, to evacuate? What [were] they supposed to do? Fly?” New Orleans citizen and evacuee Terrol Williams observed, “I think, unfortunately, a lot of the destruction that we saw, that persons were unable to safely evacuate, was because they were basically poor,” which was echoed by Doreen Keeler: “They suffered through it because they had no way of getting out.” New Orleans citizen and evacuee Leah Hodges complained that “[t]he stray animals from the animal shelter, most of whom would have been euthanized, were evacuated 2 days before the storm, and the people were left to die. Buses that could have gotten our people, who otherwise could not get out, were left to flood, and people were left to die.” And Barbara Arnwine, Executive Director for the Lawyers Committee for Civil Rights, testified: “We know that people were not able to evacuate because some people just didn’t own cars.”

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48 Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina, 109th Cong., A Failure of Initiative 111-112 (Comm. Print 2006)
Essentially, the most common obstacles that stand in the way of a successful evacuation effort boil down to three basic issues: 1) timeliness of an evacuation order; 2) means of transportation; 3) satisfaction of special needs. Tending to these issues must be the bedrock upon which the Shelter Cooperative is conceived. To accomplish this goal, a series of services must be rendered in the event that a preventive evacuation order is issued.

**THE SHELTER COOPERATIVE’S ACTION PLAN**

1- The Preemptive Evacuation Notice (PEN)

All things considered, a formal evacuation order is not actually needed in order to leave a threatened area. Especially in locations that are prone to disastrous meteorological events, the general population might be more inclined to mobilize before an evacuation order is emitted. In any case, we consider that earlier evacuation efforts allow more time to execute a successful evacuation effort. For this reason, we consider that one of the services that could prove to be most useful is the PEN. This service would basically consist of an integrated messaging system that would serve as a notice to the membership of the activation of the Shelter Cooperative’s evacuation protocols. All means of communication should be utilized in order to achieve an ample and effective notice to the membership, e.g., text messaging, emails, prerecorded voice messages, social media, etc. A successful notice should provide the membership sufficient time to commence evacuation preparations, such as preserving vital documentation (passports, birth certificates, IDs, insurance, medical history, etc), packing climate appropriate clothing, securing medication and other vital health related goods, acquiring gasoline for the trip (if private transportation is an option), among other actions that would improve the success of the evacuation efforts. One interesting issue that would have to

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49 It's important to keep in mind that our proposed Shelter Cooperative is not meant to tend to the needs of individuals after the effects of a disaster, but rather before its occurrence. The main goal is to provide those services necessary in order to aide individuals that otherwise would not be able to overcome the economic and logistical burdens that come with following an evacuation order.
be considered by the membership is **how early** would such a notice have to be emitted in order to provide adequate time for preparations without wasting time and resources. One way of deciding the appropriate time frame could be developed using a **hurricane watch** or **hurricane warning** issued by the National Oceanic and Atmospheric Administration’s (NOAA) National Hurricane Center. The difference between the two lies in the severity of the possible danger and time in advanced that is required.

A **watch** lets you know that weather conditions are favorable for a hazard to occur. It literally means “be on guard!” During a weather watch, gather awareness of the specific threat and prepare for action—monitor the weather to find out if severe weather conditions have deteriorated and discuss your protective action plans with your family. [...] Because outside preparedness activities become difficult once winds reach tropical storm force, watches are issued 48 hours in advance of the anticipated onset of tropical-storm-force winds. [...] A **warning** requires immediate action. This means a weather hazard is imminent—it is either occurring (a tornado has been spotted, for example) - or it is about to occur at any moment. During a weather warning, it is important to take action: grab the emergency kit you have prepared in advance and head to safety immediately. Both watches and warnings are important, but warnings are more urgent. [...] Because outside preparedness activities become difficult once winds reach tropical storm force, warnings are issued 36 hours in advance of the anticipated onset of tropical-storm-force winds.50

By relying on a **warning** or **watch**, the Shelter Cooperative would use a third party, in this case NOAA, in order to reach an informed and fair decision. It is our opinion that, in this case, the **watch** should be favored over the **warning** due to the fact that it offers more time (48 hours) to equip themselves. Once ready to move, the evacuees would have to mobilize in order to reach their designated shelter; but given the prior discussion, some may not have the means to do so. To solve this issue, we propose the following:

2- The Carpool System (CarSys)

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Having a guaranteed shelter is of little importance if the evacuee cannot reach it. That is why it is so important for the Shelter Cooperative to provide a service to such ends. Although a wide array of arrangements could be considered to meet this demand, we consider that a carpooling might be the best way to go. The CarSys would provide an effective way for the membership to gain access to immediate transportation. The main objective would be a simple one: any member with sufficient private transportation has the option of sharing its transportation with those members who do not. This means that the Shelter Cooperative would have three classes of membership: the *passenger class*, the *driver class* and the *mobile class*. As their names may suggest, each one is identified based on their transportation responsibilities. The simplest to describe is the *mobile class* since they assume all responsibility related to their transportation. No one else, not even the cooperative, is liable for their failure to evacuate due to mobility issues. On the other hand, the other two classes, the *drivers* and the *passengers*, would in fact have a binding agreement governing their relationship, in addition to a contractual relationship with the Shelter Cooperative itself. Such an arrangement has at least three important issues that must be settled: 1) the drop-off point of the passenger; 2) that there be a contractual obligation between the passenger and the driver; 3) that there be a contractual obligation between the driver and the Shelter Cooperative. The first issue, and perhaps the most important, is easily taken care of by establishing a maximum distance requirement between the driver’s and passenger’s shelters. As will be explained further below, all members will have a designated shelter located in an area beyond the reach of the disastrous event. This implies that not all evacuees will be temporarily relocated to the same area; perhaps not even the same town. As a result, if left unregulated, a situation could arise in which a driver must go out of his way to deliver the passenger to his destination. This could be a disincentive for members to become *drivers*,...
placing the CarSys in a precarious state. On the other hand, the passenger might also have some reservations due to the fact that he will be depending on the actions of a third party with who he might not have any other relationship with outside of the Shelter Cooperative. After all, it is the passenger who risks the most due to the fact that his successful evacuation hinges on the willingness and capability of the driver. In sum, it would be very understandable for a member of the Shelter Cooperative to feel apprehensive to the idea of allowing another member to affect their evacuation plan. For these reasons, the contract between the driver and the passenger is paramount to establishing a smooth and effective relationship between the two. Its purpose will be to reassure both parties that neither will suffer a delay in their evacuation efforts because of their condition as either driver or passenger. One of the ways to accomplish such an end is to establish a set of caveats that must be observed between the driver and the passenger in order to avoid that either of the two suffer any delay in their evacuation. The most important would be regarding the logistics that would have to be observed by both participants: the time of pickup, the amount of goods that can be transported, how many passengers need to fit into the vehicle, the transport of animals, penalties for breach of contract, etc. In our view, the more detailed the agreement, the less possibility of unnecessary complications arising. However, this contract would not be the only one governing the relationship between the passenger and driver. As mentioned before, the driver would also have a binding arrangement established between him/her and the Shelter Cooperative itself. Unlike the contractual relationship discussed above, this one would define the duties and obligations undertaken by the driver in relation to his ability to serve as such. The subjects covered might include: the size of the vehicle to be used, the regular maintenance of the car, the obligation to notify if the vehicle is replaced with another, the penalties for breach of contract, etc. One clause that might prove particularly important would
be an allowance clause. Such a clause would provide a stipendium provided by the cooperative so that the driver could cover the costs of fuel and other miscellaneous costs related to transport. Ideally, a single agreement would contain both contractual obligations described above. This way, all parties involved in the arrangement would be aware of each agreement and would be able to certify that one does not negatively affect the other.

3- The Shelter Network (ShelNet)

Lastly, the Shelter Cooperative’s most important benefit would be the guarantee of access to adequate shelter for its membership through its ShelNet program. To accomplish this, each and every member of the Shelter Cooperative would wear two hats: the receiver of shelter (the evacuee), and the giver of shelter (the aide). In order to properly explain how this would work, let us imagine that a hurricane is forecast to strike one community (Community A) but not another (Community B). Let us further imagine that a fully functional Shelter Cooperative has been set up with members in both communities. As the hurricane approaches Community A, the National Hurricane Center emits a hurricane watch, followed by an evacuation order issued by the mayor’s office. As expected, the Shelter Cooperative’s membership are following suit, and with the help of the cooperative’s PEN, have had a head start in their preparations. Meanwhile in Community B, the unaffected aides have also heeded the PEN and are getting ready to receive the incoming evacuees. Once preparations have been completed, the aide is ready to receive his preassigned evacuee, allowing his house to be used as a temporary shelter. This means, of course, that each member would need to agree to allow their home to serve as a temporary shelter for another member.

Although necessary, a roof over one's head is not sufficient to provide a proper shelter. It is indispensable to keep in mind that one of the most affected populations in Hurricane Katrina was formed by individuals with particular needs, e.g., senior citizens, people with physical and
mental disabilities, minors, newborns, etc. The Shelter Cooperative is a way for them to cover these needs in the event of a disaster. In order to secure that they will receive the required support, the relationship between the aide and the evacuee would have to be constructed in a case by case basis. However, this does not mean that the formation of relationship between aide and evacuee would need be a slow or difficult one. One way this process could be streamlined could be through the use of an Initial Interview with new members. This way, the new member could answer two important questions: *Do you have any special needs?* and *What special needs can you cover/are you willing to cover?* This way, the cooperative could identify those individuals who have the ability to meet the needs of the most vulnerable and the cooperative could establish certain incentives to reward these additional efforts. Also, it is important to note these questions are designed to deal with the duality of the membership since each one could be at times the evacuee and at other times the aide. The fact that each member could be an aide or an evacuee, depending on the areas affected by a disaster, is one of the most important aspects of the Shelter Cooperative since it allows for a mutuality to exist among the membership. In order to guarantee that this mutuality will be preserved, a contractual relationship could be established between the members and the Shelter Cooperative through its *articles of incorporation*. Considering its importance, we will now discuss how the Shelter Cooperative’s legal formation could help assure its benefit providing role.

**EMBODYING THE IDEA**

When a group of individuals wishes to form a cooperative entity, certain steps need to be taken. One of the first steps this group (here on “the collective”) will have to take is to identify the laws that apply to the formation of cooperatives in their jurisdiction. In the special case of the Shelter Cooperative, certain laws would most certainly apply to the formation of a
mutual insurance company and therefore must be considered in the initial stages of organization. Also, the collective will need to investigate if it can choose to be a **stock** or **non-stock** organization. Generally speaking, a stock cooperative is allowed to “…issue common stock and, in some cases, preferred stock, with ownership of common stock carrying with it voting right in the cooperative.”

51 Under this scheme, a cooperative could be able to provide certain incentives for investment in the effort of accumulating capital. On the other hand, a non-stock cooperative “…issues membership certificates that include voting rights and membership in the cooperative, and capital certificates that are similar to the preferred stock issued by stock cooperatives.”

52 Simply put, the collective will need to review all the applicable regulations and decide which status provides the necessary options for the cooperative’s administration. Once this initial, and important step has been taken, the collective will need to begin the process of drafting the **articles of incorporation**. These bylaws will serve as the cooperative’s foundation; containing “…the name of the cooperative, its principal place of business, the names of the incorporators, and information about the cooperative’s capital structure.”

53 Given their importance, the formation of the articles of incorporation could require a highly detailed and informed approach.54 There should be a deep commitment from the collective to develop a truly inclusive and open process leading to their formation. This would allow the collective to identify possible friction points that could develop between the membership and the governing board55 of the cooperative. In addressing these potential

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52 Id.
54 One of the issues that usually requires a lot of consideration is the distribution of surplus within the cooperative. After costs and debts have been covered, some of the remaining funds can be re-invested into the cooperative while another portion is redistributed among the membership based on each member’s patronage. The subject of what exactly constitutes “patronage” could require specific consideration.
55 Most cooperatives have a board whose purpose is to handle the day to day activities of the cooperative. The constituents of said body are appointed by the membership of the cooperative. Although not always the case, sometimes the membership and the board have diverging opinions about the management of the cooperative.
sources of conflict, the collective must decide which decisions “…will require the consent of the members as opposed to, or in some cases in addition to, the approval of the board.”\textsuperscript{56} We believe that this will prove to be a vital decision to be made by the collective due to the fact that it will directly affect the speed at which the cooperative can adapt to market changes. As a result, we believe that governance matters will be the main theme of the cooperative’s articles and will discuss “…requirements of membership, procedures for annual and special meetings of members, and procedures for elections of directors by the members.”\textsuperscript{57} Lastly, the cooperative’s articles must comply with any applicable tax law since cooperatives usually must meet certain prerequisites, such as limitations on stock dividends, limitations on dividend rate, inability to report deductions for capital stock dividends, a requirement that the profit distribution be done according to member patronage, a requirement that issued cooperative stock be in the hands of the membership, among others.\textsuperscript{58} Although tedious, these requirements might actually pay off since many jurisdictions have specific tax incentives specifically legislated for cooperative enterprises. Once all the required legal issues have been considered, the collective is now in the position to request all relevant government agencies to recognize the cooperative as a separate legal entity, under which they can do business.\textsuperscript{59}

**CONCLUSION**

As we can see, the cooperative form of insurance could be a viable way of mitigating some of the main factors in the non-compliance of evacuation orders. Through the establishment of a

\textsuperscript{56} CHARLES T. AUTRY & ROLAND F. HALL, THE LAW OF COOPERATIVES 39 (2009)
\textsuperscript{57} Id.
\textsuperscript{58} CHARLES T. AUTRY & ROLAND F. HALL, THE LAW OF COOPERATIVES 32 (2009)
\textsuperscript{59} Actually, cooperative firms and hierarchical businesses share very basic legal similarities: (1) both offer limited liability to their members and owners respectively; (2) both have perpetual existence; (3) usually, both are formed by filing certain documents with a government agency and normally adopt bylaws for their operations; (4) both have governing bodies comprised of officers and directors; (5) both utilize similar forms of accounting; (6) a similar standard of care is observed by the officers and directors of both forms of enterprise. See CHARLES T. AUTRY & ROLAND F. HALL, THE LAW OF COOPERATIVES 26-27 (2009)
Shelter Cooperative, certain communities could have the support they need to allow for a successful evacuation effort. Also, considering that some of the most vulnerable members of a community are also some of the poorest, the cooperative could establish a specific fund that could serve to cover their membership costs. Said fund could be replenished through donations from individuals, or perhaps certain government programs, if legally possible, could intervene. In sum, the Shelter Cooperative could allow for those individuals who are most exposed to disaster to take matters into their own hands and develop an entity who will provide services that are conducive to a successful evacuation effort.