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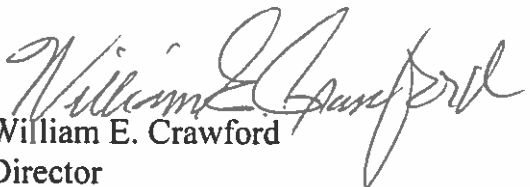
Senator John A. Alario, Jr.
President of the Senate
P.O. Box 94183
Baton Rouge, Louisiana 70804

RE: SR 180 OF 2015

Dear Mr. President:

The Louisiana State Law Institute respectfully submits herewith its report to the legislature relative to feasibility of the use of levee roads by owners of enclosed estates.

Sincerely,


William E. Crawford
Director

WEC/puc
Enclosure

cc: Senator Ben Nevers

email cc: David R. Poynter Legislative Research Library
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Secretary of State, Mr. Tom Schedler
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LOUISIANA STATE LAW INSTITUTE

PRIVATE USE OF LEVEE ROADS COMMITTEE

**Report to the Legislature on Senate Resolution No. 180 of the 2015 Regular
Session:**

Feasibility of the Use of Levee Roads by Owners of Enclosed Estates

Prepared for the Legislature on

October 10, 2016

Baton Rouge, Louisiana

PRIVATE USE OF LEVEE ROADS COMMITTEE

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SENATE RESOLUTION NO. 180

BY SENATOR NEVERS

A RESOLUTION

To urge and request that the Louisiana State Law Institute study and make recommendations regarding the feasibility of the use of levee roads by owners of enclosed estates to reach public roads.

WHEREAS, Civil Code Article 692 provides that the owner of an enclosed estate may not demand the right of passage or the right-of-way for a utility anywhere he chooses, and that the passage generally shall be taken along the shortest route from the enclosed estate to the public road or utility at the location least injurious to the intervening lands; and

WHEREAS, in order to perform its function and duties a levee authority may own or have access to a levee road for passage; and

WHEREAS, the Louisiana State Law Institute should study whether the owner of an enclosed estate, in order to reach a public road, may be authorized by a levee authority to utilize a levee road for passage to a public road; and

WHEREAS, such use of a levee road by a private estate owner raises potential legal issues that should be studied, including questions of property access, servitude, ownership and flood control integrity of the levee, and potential restrictions that could be placed upon the use of such levee road by a private estate owner.

THEREFORE, BE IT RESOLVED that the Senate of the Legislature of Louisiana does hereby urge and request the Louisiana State Law Institute to study and make

recommendations regarding the feasibility of the use of levee roads by owners of enclosed estates to reach public roads.

BE IT FURTHER RESOLVED that any recommendations for revising state law shall be in the form of proposed legislation with appropriate substantive text to effect such recommendations in a statutorily consistent and coordinated matter.

BE IT FURTHER RESOLVED that a copy of the Law Institute report, together with any recommendations, shall be submitted to the Legislature of Louisiana not later than February 15, 2017.

BE IT FURTHER RESOLVED that a copy of this Resolution be transmitted to the Louisiana State Law Institute.

PRESIDENT OF THE SENATE

October 10, 2016

To: Senator John A. Alario, Jr.
President of the Senate
P.O. Box 94183
Baton Rouge, LA 70804

**REPORT TO THE LEGISLATURE IN RESPONSE TO
SENATE RESOLUTION No. 180 OF THE 2015 REGULAR SESSION**

I. Introduction

Louisiana Senate Resolution No. 180 of the 2015 Regular Session charged the Louisiana State Law Institute with the task of studying and making recommendations on the feasibility of enacting legislation that would allow the owner of an enclosed estate to use a levee road crossing a neighboring tract of land for the purpose of obtaining access to a public road. In August 2015, the Private Use of Levee Roads Committee was established by the Council of the Louisiana State Law Institute, and Professor John A. Lovett, Loyola University New Orleans College of Law, was named the reporter of the Committee. The following individuals were named as members of the Committee: James Breaux (New Orleans), Professor Andrea Carroll (Baton Rouge), John Crigler, Jr. (St. Joseph), Scott Gallinghouse (New Orleans), Dallas Kingham (Lake Charles), Scott Kristopher Kirkpatrick (Baton Rouge), Andrew Novak, II, (New Orleans), Erik Piazza (Baton Rouge), Professor Sally Richardson (New Orleans), and Professor Shawn Vance (Baton Rouge).

On October 30, 2015, the Committee held its first meeting and discussed a memorandum prepared by Professor Lovett. At the conclusion of the meeting, the Committee voted to recommend that the legislature not enact any new legislation regarding the private use of levee roads. Although the committee is sympathetic to the concerns that motivated Senate Resolution No. 180, the Committee concluded that Louisiana law currently provides sufficient tools in Louisiana Civil Code Articles 689 to 696.1 to address the needs of enclosed estate owners. The Committee believes existing law adequately balances the interests of an enclosed estate owner with those of neighboring property owners. Finally, the Committee worries that granting a new right to enclosed estate owners to claim a servitude of passage across levee roads would unduly complicate Louisiana's existing law on enclosed estates and harm the ability of levee districts to fulfill their vital public responsibility of inspecting, maintaining and improving levees across the state of Louisiana.

This report reviews the concerns expressed in Senate Resolution No. 180, addresses how the current provisions of Louisiana law governing interests of enclosed estate owners and those of neighboring property owners resolve most of the concerns raised by the resolution, and explains the Committee's recommendation that the legislature take no action.

II. Senate Resolution No. 180 and Existing Louisiana Law

Senator Robert Adley explained the concerns that motivated the resolution to the Reporter in a lengthy conversation. The predicament that motivated the resolution relates to an enclosed estate owner whose property is bordered on one side by a levee road—a road which, after traversing neighboring estates, connects with a public road. Because the local levee district at issue historically did not object to use of the levee road by members of the public, Senator Adley wondered whether it would be possible to craft legislation that would allow the owner of the enclosed estate to claim a right of passage across the adjacent neighboring estates along the course of the levee road so that the owner of the enclosed estate could obtain access to a public road, provided the use of the levee road by the enclosed estate owner did not interfere with a levee district’s operational or maintenance activities on the levee. Senator Adley hoped that the Law Institute might be able to propose a change in the law that would allow an enclosed estate owner to obtain a servitude of passage along a levee road without having to pay compensation to the neighboring land owner(s) or otherwise satisfy the conditions imposed by Louisiana Civil Code Articles 689 to 696.1.¹

A. Enclosed Estates and Rights of Passage: Louisiana Civil Code Articles 689-696.1

Currently, Louisiana law provides a carefully balanced regime for addressing the interests of an enclosed estate owner and the interests of property owners who own neighboring land across which access to a public road might be claimed. Louisiana Civil Code Article 689 allows the owner of an enclosed estate, that is, “the owner of an estate that has no access to a public road or utility,” to claim a right of passage “over neighboring property to the nearest public road or utility” after compensating the neighbor for the passage and indemnifying the neighbor for any damage occasioned by the creation of the right of passage. La. Civ. Code Art. 689 (1977). If the enclosed estate owner chooses to exercise the legal servitude provided by Article 689, the extent of the resulting servitude of passage, the nature of the necessary constructions that can be made in connection with the servitude, and the precise location of the servitude are governed by Articles 690 through 692 of the Civil Code.

The only situation in which an enclosed owner is precluded from claiming a right of passage is when the enclosed estate owner is in some sense responsible for his own enclosed status. If the enclosed status results from the enclosed estate owner’s own voluntary act or omission (*i.e.*, if he partitioned a lot or tract or conveyed one or more of several adjacent lots or tracts and retained the enclosed lot or tract without providing for a means of reaching a public road or utility), the owner of neighboring land across which a right of passage might otherwise be claimed is not obligated to provide a right of passage to the enclosed estate owner. La. Civ. Code Art. 693 (1977). Compare *Sceroler v. Rancher*, 808 So.2d 803 (La. App. 1 Cir. 2002) (denying claim to an Article 689 right of

¹ A detailed history and analysis of the legislative history preceding the final passage of Senate Resolution No. 180 can be found in the Reporter’s October 30, 2015 Memorandum to the Private Use of Levee Roads Committee.

passage across a narrow strip of land because the enclosed estate owners were entitled to claim an Article 694 gratuitous passage to another public road across their parents' land and the father of the enclosed estate owners had been able to traverse the entire tract prior to the donation of the enclosed lots to his children from "boundary to boundary" by means of a tractor), with *Stuckey v. Collins*, 464 So.2d 346 So.2d 348 (La. App. 2 Cir. 1985) (granting an Article 689 right of passage across a narrow strip of land where it would be highly impossible or impractical to make use of a gratuitous passage across another neighboring tract of land).

In some relatively rare cases, an enclosed estate owner can claim a right of passage across neighboring land without having to compensate and indemnify the neighboring landowner. This right to claim a "gratuitous passage" arises if a partition or voluntary alienation by the neighboring landowner produced the enclosure. La. Civ. Code Art. 694 (1977). The primary difference between Article 693 and 694 can be understood in the following terms:

Whereas Article 693 of the Civil Code precludes the owner of an enclosed estate from claiming a right of passage when she is the *vendor, donor or transferor* of land over which passage to a public road was previously possible, Article 694 protects and grants a gratuitous right of passage to the enclosed estate owner who is a vendee, donee or acquirer of the enclosed estate. The underlying assumption here is that the original owner (vendor, donor or transferor) must have intended to confer a right of passage to his transferee and, therefore, the law will imply such a grant and recognize the transferee's right to claim it gratuitously.

John A. Lovett, Markus G. Puder and Evelyn L. Wilson, *Louisiana Property Law: The Civil Code, Cases, and Commentary* 740 (2014) (emphasis in original).

B. Other Relevant Legislation

Putting aside the Civil Code Articles that regulate the legal servitude of passage for enclosed estates, there is relatively little positive law in Louisiana that governs or even speaks to the subject of levee roads. Article 665 of the Civil Code, the source of the so called "levee servitude" in Louisiana, provides:

Art. 665. Legal public servitudes

Servitudes imposed for the public or common utility relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers for the making and repairing of levees, roads, and other public or common works. Such servitudes also exist on property necessary for the building of levees and other water control structures on the alignment approved by the U.S. Army Corps of Engineers as provided by law, including the repairing of hurricane and protection levees.

All that relates to this kind of servitude is determined by laws or particular regulations.

The case law interpreting “the levee servitude” is extensive, but is generally inapplicable to the questions presented to this Committee by Senate Resolution No. 180.²

The Louisiana Revised Statutes contain a handful of provisions that might have some relevance to the use of levee roads. First, Louisiana Revised Statute 48:491(A) provides generally that “[a]ll roads or streets in this state that are opened, laid out, or appointed by virtue of any act of the legislature or by virtue of an order of any parish governing authority in any parish, or any municipal governing authority in any municipality *shall be public roads or streets*, as the case may be.” (emphasis added). Strictly speaking, this provision is likely not material to most levee roads that are constructed on the top of a levee as levee boards and districts are neither a “parish governing authority” nor a “municipal governing authority”. Subsection B(1) of the same statute sets forth the rules for tacit dedication of a road or street when a parish or municipal governing authority keeps up, maintains or works a road or street for a period of three or four years. Subsection C of this statute provides:

All roads or streets made on the front of their respective tracts of lands by individuals *when the lands have their front on any of the rivers or bayous of the state shall be public roads when located outside of municipalities* and shall be public streets when located inside of municipalities.

This provision appears to refer to what many of us might call a *river road*, but not necessarily a *levee road*. At least one attorney general opinion from 1977 indicates that a road built on top of the West Atchafalaya Guideline Levee that had been maintained by the St. Martin Parish Police Jury for a period longer than three years could be subject to tacit dedication within the meaning of La. R.S. § 48:491. *See* La. Atty. Gen. Op. No. 76-1653. 1977 WL 39355 (1977).

Chapters 3 and 4 of Title 38 of the Revised Statutes also include a number of detailed laws addressing levee and drainage districts. Louisiana Revised Statute 38:301 is the most important for purposes of this report. This statute grants levee boards and levee and drainage boards the authority “to construct and maintain levees, drainage, and levee drainage and do all other things incidental thereto.” Subsection A(3) of the statute

² One of the most important “laws or particular regulations” that gives meaning to the levee servitude is the so called “batture exemption” to the general constitutional duty of the state or a political subdivision to pay just compensation to an owner when private property is taken or damaged by the state or a political subdivision for a public purpose. The Louisiana Constitution still maintains the “batture exemption.” *See* La. Const. Art. 1, § 4(E) (“This section shall not apply to appropriation of property necessary for levee or levee drainage purposes.”). *See also* La. Rev. Stat. § 38:301(C)(1)(a) (“All lands, *exclusive of batture*, and improvements hereafter actually taken, used, damaged, or destroyed for levee or levee drainage purposes shall be paid for at fair market value to the full extent of the loss.”) (emphasis added). For a lengthy comment on the historical background, case law interpreting, and the geographic scope of the batture exemption *See* John A. Lovett, *Batture, Ordinary High Water, and Louisiana Levee Servitude*, 69 Tul. L. Rev. 561 (1994).

allows levee boards and levee and drainage districts along the main line of the Mississippi River between New Orleans and Baton Rouge “to construct bicycle paths and walkways along the top of the levees” and states that the legal servitude granted to a levee board and a levee and drainage board pursuant to law shall include the construction of bicycle paths and walkways along the top of levees.” Subsection A(4) grants *all* levee boards and levee and drainage boards the power to allow the public to utilize levees under their jurisdiction “for recreational purposes, as long as the structural integrity of the levee or flood control structure is not compromised” and grants to these entities the power “to construct or permit bicycle paths and walkways.”

Louisiana Revised Statute 38:306 similarly grants to the board of commissioners of any levee or levee and drainage district broad powers “to buy and hold, sell and transfer, or exchange property, make and execute contracts, and do and perform any and all acts necessary to insure the thorough and adequate protection of lands of the district from damage by flood, and in the case of levee and drainage boards, for the adequate drainage control of the district.” No provision of this statute, however, makes any specific reference to levee roads.

Louisiana Revised Statute 38:213 provides additional restrictions on the nature of public access rights along levees. It specifies that “[*n*]o person shall ride, drive or haul upon the public levees or integrated coastal protection projects or their rights-of-way *except where*, in the judgment of the levee commissioners of a district and the Department of Transportation and Development, or for levees or integrated coastal protection projects in the coastal areas as defined in R.S. 49:214.2, the Coastal Protection and Restoration Authority, *ample provision has been made to guard against any damage to which the levees or integrated coastal protection projects may thereby be exposed from wear, tear, and abuse.*” (emphasis added). In addition to giving levee districts this broad authority to prevent and regulate vehicular access to public levees, the statute continues by requiring each levee district to “publish guidance, signage and require special permits as they deem appropriate to allow them to make provisions for limited riding, driving or hauling.” *Id.* Additional Subsections of this statute address penalties for violation of the statute, injunctive relief, levee district access rights, and crossings of levees.³

Finally, Louisiana Revised Statute 38:225 provides detailed rules prohibiting persons from placing things on or near levees that obstruct or interfere with the safety of levees or is an obstacle to the inspection, construction, maintenance or repair of any levee. Two more statutes address respectively the obligation of parishes to “drain public roads which are parallel or contiguous to any public levee” and the duty of owners, lessees and possessors of land abutting any public road parallel or contiguous to any public levee *not* to close or place any obstruction in the drains or ditches which would

³ Subsection B of R.S. 38:213 allows levee districts to establish a penalty for violation of the Section, provided the penalty does not exceed the penalty for criminal trespass as defined in R.S. 14:63, and to seek injunctive relief and collect expenses incurred as a result of a violation. Subsection C reserves to officers of the state and levee districts or a parish the right to access public levees in the performance of their duties in inspecting, guarding, or repairing the levees. Finally, Subsection D provides, among other things, that this Section does not interfere with “crossing over any public levees, at ramps or inclines established under plans and specifications of the Department of Transportation and Development.”

“interfere with the effective, thorough and continuous drainage of the public road or levee.” La. Rev. Stat. §§ 38:142, 220.

C. Case Law and Attorney General Opinions

A small number of reported Louisiana judicial decisions and Attorney General opinions shed some light on the kind of disputes that can arise in connection with levee roads and claims by landowners for access to levee roads. As noted above, one attorney general opinion from 1977 observed that a road maintained by a local police jury for more than three years could be subject to tacit dedication and become a public road under La. R.S. § 48:491. An even older Attorney General opinion likewise cited La. R.S. § 48:491 and Louisiana Civil Code Article 665 in support of the conclusion that a police jury may expend public funds to maintain a road on top of a levee. La. Atty. Gen. Op. Dec. 2 1966 (p. 359). This same 1966 opinion noted, however, that a levee board could prohibit anyone from riding, driving or hauling upon public levees, except where provision was made to guard against damage to the levees. *Id.*

Very little case law addresses the status of levee roads. In *Hathorn v. Board of Commissioners of Red River, Atchafalaya, Bayou Bouef Levee District*, 218 So. 2d 335 (La. App. 3 Cir. 1969), Judge (later Justice) Albert Tate, Jr. upheld the constitutionality and reasonableness of a levee board resolution that required landowners to remove fences along a levee crown unless cattle guards were installed to permit levee district employees and officials easy access to the levee for purpose of levee inspection and repair. Thirteen landowners had filed a suit to enjoin the levee board from enforcing the resolution. Writing for a unanimous panel, Judge Tate reviewed the history of the levee servitude under Civil Code Article 665 and discussed Louisiana Revised Statute 38:225, first adopted in 1892 and amended in 1966, which, as noted above, prohibits the placement of any object or material on a levee that is an obstacle to the inspection, construction, maintenance or repair of a levee.

After reviewing Civil Code Article 665 and La. R.S. § 38:225, the court held that (1) the landowners' acquisition of the riparian land at issue was subject to the ancient servitude now formulated in Civil Code Article 665, (2) the levee board's requirement that the landowners install cattle guards did not constitute an unreasonable hardship on the landowners in their cattle operations, (3) the levee board's exercise of its rights under Civil Code Article 665 did not offend due process or equal protection guarantees of the state or federal constitutions, (4) and the Second Circuit's then recent decision in *Lake Providence Port Commission v. Bunge Corp.*, 193 So.2d 363 (La. App. 2 Cir. 1966), was distinguishable. The court's ruling in *Hathorn* thus underscores the vital public policy reasons that support the levee servitude in Louisiana and the wide scope of authority given to levee districts to construct, manage, and maintain levees in Louisiana to protect the common good.

III. Options Considered and Rationales for the Committee's Recommendation of No Action

After considering the Civil Code Articles, statutory provisions, case law and attorney general provisions described above, the Committee proceeded to evaluate how to respond to Senate Resolution No. 180. The Committee considered four options. The *first* option was simply to take no action. The *second* option was to draft a short proposed amendment to the Civil Code or a short revised statute. Either provision would provide that if a levee authority permits the owners of property surrounding an enclosed estate to use a levee for passage to a public road, and assuming the levee board owns the underlying land and the levee road crosses the enclosed estate, then the owner of the enclosed estate could also use the levee for passage to a public road, even if that passage is not the shortest route from the enclosed estate to a public road. This rule could have been inserted into Article 692 of the Civil Code or could have appeared as a new Louisiana Revised Statute 9:1261. This was more or less the solution proposed by Senate Bill No. 137 of the 2015 Regular Session. The initial piece of proposed legislation addressing this subject is discussed in greater detail below.

The *third* option would have been to draft a lengthier, more detailed statutory scheme that could provide for a right of an enclosed estate owner to use a levee road traversing a neighboring tract of land to gain access to a public road *and* to obtain a servitude of passage over a neighbor's land to reach a levee road, from which the enclosed estate owner could then gain access to a public road. The Committee examined several proposed versions of such a scheme that could have served as a starting point for drafting efforts. See Exhibits F and G to Reporter's October 30, 2015 Memorandum. Yet another potential drafting model that the Committee considered is found in Louisiana Revised Statute 9:1254, a statute that provides that the owner of an enclosed estate "who has no access to his estate other than by way of an existing waterway passing through neighboring property shall have a right and servitude of passage on such waterway." The rest of that statute provides detailed rules relating to the scope of this legal servitude over waterways for purposes of avoiding enclosure. The *final* option was to propose a completely novel legislative remedy. After considering all of these options, the Committee voted unanimously to recommend no action. The Committee reached this conclusion for five primary reasons.

A. The Limited Property Rights of Levee Districts in Most Cases

First, the Committee was concerned that even if it succeeded in drafting some legislation that gave an enclosed estate owner access to a levee road traversing the enclosed estate owner's own property and a right to use a levee road traversing neighboring land until the levee road intersected with an actual public road, we would not have accomplished enough. Our concern was that the owners of the affected neighboring land would still, in most cases, be entitled to claim indemnification and damages under Article 689 of the Civil Code and require compliance with other codal provisions regarding location of the servitude *because in most cases when a levee crosses privately owned land a levee district does not own the land underneath the levee but merely*

possesses the land by virtue of a servitude. If the legislature were to enact a new right of enclosed estate owners to obtain passage across a levee road that sits atop a levee that exists by virtue of a servitude, the owner of the enclosed estate would still, in these cases, be required to (a) compensate the neighboring landowner for the right of passage and indemnify his neighbor for the damage he may occasion and (b) satisfy the neighbor (or a court) that the right of way across the levee road represented “the shortest route from the enclosed estate to the public road . . . at the location least injurious to the intervening lands.” La. Civ. Code Art. 692 (1977).

One way to avoid the “shortest route” and “least injurious” location requirements embedded in Civil Code Article 692 would have been to carve out a specific levee road exemption in that article. This is essentially the approach taken by Senator Adley’s original Senate Bill 137, attached to the Reporter’s October 30, 2015 Memorandum as Exhibit C. That proposed legislation would have amended Article 692 of the Civil Code to read as follows:

Art. 692. Location of passage

The owner of the enclosed estate may not demand the right of passage or the right-of-way for the utility anywhere he chooses. The passage generally shall be taken along the shortest route from the enclosed estate to the public road or utility at the location least injurious to the intervening lands. **Nevertheless, if a levee authority permits the owners of property surrounding an enclosed estate to use the levee for passage to a public road, then the owner of the enclosed estate may use the levee for passage to a public road, even if that passage is not the shortest route from the enclosed estate to a public road.**

The location of the utility right-of-way shall coincide with the location of the servitude of passage unless an alternative location providing access to the nearest utility is least injurious to the servient estate and intervening lands.

The court shall evaluate and determine that the location of the servitude of passage or utility shall not affect the safety of the operations or significantly interfere with the operations of the owner of the servient estate or intervening lands prior to the granting of the servitude of passage or utility.

Under this proposed legislation, although an enclosed estate owner would theoretically be able to claim a servitude of passage across the neighboring land along the path of the levee, even if the levee road was not the shortest route or found at the least injurious location, the enclosed estate owner would still be required to compensate and indemnify the neighboring property owner as required by Civil Code Article 689, unless the enclosed estate owner could prove entitlement to a gratuitous right of passage under Article 694 of the Civil Code. In short, the Committee was not convinced that an abbreviated amendment to Civil Code Article 692 alone would have significantly enhanced the rights of the enclosed estate owner. Meanwhile it would have created a

potentially confusing new wrinkle to disputes over the location of claimed rights of passage.

The Committee also considered whether the approach taken by the much more detailed and expanded statutory schemes proposed in the summer of 2015 would have addressed this problem. Here, the Committee specifically noted the third set of Senate amendments to Engrossed House Bill No. 196, attached to the Reporter's October 30, 2015 Memorandum as Exhibit F. That proposed legislation sought to establish an entirely new chapter in Title 9 (Revised Statutes 9:1261 through 1268) that would have authorized levee boards and drainage boards "to grant a servitude of passage along an existing levee road to the nearest public road and across the levee to reach the levee road for the benefit of an estate that has no access to a public road" (§1262) and would have allowed the owner of an enclosed estate to "claim a servitude of passage across his neighbor's land to reach an existing public road and to traverse the levee road to the nearest public road whether or not there is a public road nearer to the enclosed estate" (§1263).⁴ Again, this approach would have left unanswered the basic problem that an enclosed estate owner would still be required to compensate and indemnify the neighboring landowner for the impact of the acquisition of the servitude of passage. Moreover, these statutory schemes also seemed to be overly solicitous to the enclosed estate owner in that they gave the enclosed estate owner the additional right to seek a servitude of passage elsewhere across neighboring land "as if he had not obtained servitude of passage along a levee road." See Proposed La. R.S. 9:1265 in Senate Amendments to Engrossed House Bill No. 196 (2015 Reg. Sess.)

B. Increased Burdens on Servient Estates and Levee Roads

The Committee's *second* reason for recommending no action relates to the potential for a servitude of passage along a levee road to become increasingly burdensome as time goes by. Suppose, hypothetically, that the owner of an enclosed estate that establishes the right to claim a servitude of passage along a levee road crossing neighboring lands decides to partition or subdivide the enclosed estate into fifty smaller lots. In that situation, each new owner could theoretically claim the right to a servitude of passage along the levee road which could significantly increase the burden on the underlying neighboring landowners and the levee road proportionately. Although Louisiana Civil Code Article 747 establishes some limit on the degree of the additional burden on the servient estate in such a situation, the Committee was nonetheless concerned about the line drawing problems that could arise in situations involving subdivision or partition of a benefitted enclosed estate. Although negotiation and litigation regarding the "no additional burden" limitation could potentially resolve this concern, the Committee believed that it did not make sense to increase the need for such

⁴ Proposed Revised Statutes 9:1264 through 1268 address the obligation of the enclosed estate owner to build a "connecting road" (§1264), and would preserve the enclosed estate owner's rights to seek a servitude of passage on other neighboring lands under the Civil Code "as if he had not obtained a servitude of passage along a levee road," (§1265), provide for the rights of a levee board or drainage board to establish "reasonable rules" for the use of the servitude of passage along a levee road and to require use of gates (§1266), and establish a limitation of liability in favor of the state, levee boards and drainage boards (§1267).

negotiation and litigation by expanding the legal servitude of passage for enclosed estates to encompass levee roads.

C. Existing Law Already Sufficient

The Committee's *third* reason for recommending no action was its conviction that the existing law already provides a sufficiently flexible set of tools for enclosed estate owners to solve the problem of access to a public road. In particular, if a levee road does provide the shortest route and least injurious location for a servitude of passage under Article 692 of the Civil Code, an enclosed estate owner could always seek recognition of a right of passage along that route from the neighboring landowner and, if necessary, petition a court if the neighboring landowner refuses to cooperate in the establishment of such a servitude. If an enclosed estate owner can obtain rights from the neighboring landowners through negotiation or litigation under Articles 689-696.1, the enclosed estate owner could also simultaneously seek consent from a levee district to use the levee road for passage to the nearest public road, provided the enclosed estate owner agreed to any restrictions or stipulations required by the levee district to preserve its right to use the levee road for levee maintenance and operations. While enclosed estate owners might find this path of negotiation and potential litigation time consuming and expensive, the Committee believes it does provide an adequate means of redress for enclosed estate owners.

D. Deterring Private Ordering

Fourth, many Committee members also expressed the view that this type of legislative intervention might have the unintended consequence of deterring *prospective* purchasers of land from conducting sufficient title examinations and property inspections to determine whether land subject to a potential acquisition has sufficient access to a public road for the uses anticipated by the purchaser. Put differently, purchasers of land should be conducting due diligence when they purchase rural property. If they determine that property is, in fact, enclosed in advance of a purchase, they should attempt to negotiate servitude agreements with neighboring landowners or agreements with levee districts as the case may be, in advance of their purchase. If servitude agreements cannot be obtained, prospective purchasers should be on notice that they will be required to use the tools currently set forth in Articles 689 to 696.1 of the Civil Code to obtain a servitude of passage across neighboring lands. Although use of those tools will usually require the compensation and indemnification contemplated by Article 689 of the Civil Code, prospective purchasers can factor these anticipated costs into their negotiations for the acquisition of enclosed estates. The legislature should be wary of creating new legal servitudes that might encourage parties to bypass these traditional and sound real estate acquisition planning practices.

E. Not a Widespread Problem

Finally, the entire Committee agreed that the circumstances addressed by Senate Resolution No. 180, though no doubt real in some instances, was simply not common

enough to warrant a significant amendment to the existing regime addressing enclosed estates and the right of passage established in the Civil Code. No member of the Committee, which included representatives from all corners of the state and many different practice backgrounds, was aware that this kind of predicament was leading to conflict on a large scale. When such circumstances do arise, however, the Committee agreed, as discussed above, that the existing articles of the Civil Code addressing enclosed estates create a sufficiently flexible regime that should enable parties and courts to resolve most enclosed estate problems even when a levee road is in proximity to such an estate.

IV. Conclusion

For the foregoing reasons, the Law Institute does not recommend any revisions of state law regarding the use of levee roads by owners of enclosed estates to reach public roads.