



# FLOODING LIABILITY FOR TEXAS CITIES

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# Pre - Flood Control Act of 1928

## Pre Flood Control Act:

Pumpelly v. Green Bay Co., 80 US (13 Wall.) 166 (1871):

Flooding induced by the government can constitute a compensable taking.

United States v. Cress, 243 US 316 (1917):

“Seasonally recurring flooding” induced by the government can constitute a takings claim.

## Flood Control Act (1928):

Authorized the U.S. Army Corps of Engineers to design and construct levee flood-control projects and providing immunity for the Federal Government for damages caused by future flooding.

# The First Major Flood (1926)

- In 1926, the Ohio River valley and levees began breaking in the Lower Mississippi Valley and lasted over three months.
- 27,000 square miles (Greater Houston Area is 8,260 sq miles)
- Seven states
- 13 major crevasses were breached
- 637,000 people became homeless
- Direct property loss totaled \$250 to 500 million (\$3.6B - \$7.72B)
- Indirect losses brought that figure up to \$1 billion (\$15.46B)
- Floodwaters did not fully drain until the end of the summer.

# Texas Inverse Condemnation:

- (1) affirmative action by government;
- (2) a governmental intent to take or damage property,
- (3) causation (proximate cause), and
- (4) public use (purpose).

\*The test for determining intent is not “whether the government intended to damage property,” nor is it “whether it merely intended to take an action that accidentally resulted in such damage.”

# Harris County Flood Dist. v. Kerr (Tex. 2016)

## Facts:

- 400 property owners alleged inverse condemnation.
- Flooded homes as a result of the county's approval of an "unmitigated" upstream development and failure to fully complete the entity's "100-year flood" control plan.

Plaintiffs must assert some "affirmative act" by the government.

- Inaction will not give rise to a taking.
  - "[W]e cannot consider any alleged failure to take further steps to control flooding, such as the failure to complete the [flood control plan]."
  - In other word, failing to implement a flood control plan would not qualify as an affirmative act.
- \*2016: *Harris County Flood Dist. v. Kerr*, 499 SW3d 793 (Tex. 2016)

# Texas Inverse Condemnation (Intent):

- Texas Supreme Court established that governmental entities must “(1) know [] that a specific act is causing identifiable harm; or (2) know [] that the specific property damage is substantially certain to result from an authorized government action – that is, that the damage is ‘necessarily an incident to, or necessarily a consequential result of the government’s action.’”

*City of Dallas v. Jennings*, 142 SW3d 310, 313 (Tex. 2004).

# Intent + “Specificity”:

*Kerr* adds “Specificity” as a requirement -

The court in *Kerr* held that it “could not recognize liability where the government only [knew] that someday, somewhere, its performance of a general governmental function, such as granting permits or approving plats, will result in damage to some unspecified parcel of land within its jurisdiction.”



# Brandywood - Proximate Cause:

- *Brandywood*: Proximate cause = cause-in-fact + foreseeability.
- “If the land was previously subject to inundation, and after the [government action] was subject to inundation, it has been held that the owner was not entitled to recover for damages caused thereby, unless the inundation after [the governmental action] was greater in extent than it previously had been.”
- It couldn't be said that the action was a “cause-in-fact” of the damage, unless the action made the flooding worse.
- *Brandywood Hous., Ltd. v. Tex. DOT*, 74 SW3d 421, 426 (Tex. App. – Houston [1st Dist.] 2001, pet. denied).

# Gragg – Recurrent Flooding/Proximate Cause:

- The Gragg Ranch was roughly over 12,000 acres of bottomland in the Trinity River's floodplain. The river's regular flooding help support grazing areas for its cattle business.
- In 1990, Tarrant Regional Water District released water for the first time through its water supply reservoir's flood gates. As a result, the ranch suffered extensive flood damage for the first time and continued to experience a large number of floods of similar intensity.
- The Texas Supreme Court held "Recurrence is a probative factor in determining the extent of the taking and whether it is necessarily incident to authorized government activity, and therefore substantially certain to occur."
- "The recurrence requirement assures that the government is not held liable for taking property when a project's adverse impacts, and by implication its benefit to the public, are too temporal or speculative to warrant compensation."
- *Tarrant Reg'l Water Dist. v. Gragg*, 151 SW3d 546, 549 (Tex. 2004).

# Jennings and “Public Use/Purpose”:

Plaintiff must establish that the taking was for a public purpose.

The court in Jennings issued a distinction:

“[t]here may well be times when a governmental entity is aware that its action will necessarily cause physical damage to certain private property, and yet determines that the benefit to the public outweighs the harm caused to that property. In such a situation, the property may be damaged for public use.”

*City of Dallas v. Jennings*, 142 S.W.3d at 314.

Q: So what should we do when it rains?

A: It's too late



# Practical Tips:

1. Although knowledge/notice can lead to liability, ignorance is not a defense.
2. The city's planning and engineering departments should meet periodically to discuss impacts of land development on runoff, existing floodways, and other downstream property owners.
3. *Kerr* acknowledges a “waiver of liability” in the selective enforcement of existing impervious-cover restrictions. Review restrictions and ensure that they are enforced consistently with written policies.
4. Engage a licensed hydrologist/engineer to establish the effects of increased run-off downstream caused by proposed new development. This helps establish a record for cities and preemptively weakens any potential plaintiff's allegation of governmental intent to take or damage property.

# Practical Tips (Continued):

5. As development expands into known floodways, city planning departments should seek assurances from developers and their engineers for diverting the course of the floodway away from the proposed development.
6. As a final cautionary note: Use of motor-driven equipment to divert flood waters may result in waiver of governmental immunity. Water and sewer line maintenance utilize motor-driven equipment and could trigger a waiver of immunity under the Texas Tort Claims Act.



QUESTIONS?