

WATER, WIND & FIRE:
DISASTER PREPAREDNESS
(NOT A BAND NAME)

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One certainty of life is that at some point, something will go wrong. Sometimes that looks like Hurricane Harvey which set tragic records in southeast Texas in 2017. Others it's in the form of our normally warm State being pitched into the cold and the dark for a week with Winter Storm Uri in 2021. Then there are the forest fires in Central Texas that present immediate safety concerns and wreak environmental harm.

Open Meetings Act & the Emergency Exception

Normally, a city must post notice of an open meeting at least 72 hours in advance of the meeting. But when disaster strikes, there is a need for quick action.

Texas Government Code Section 551.045 states that “In an emergency or when there is an urgent public necessity, the notice of a meeting to deliberate or take action on the emergency or urgent public necessity, or the supplemental notice to add the deliberation or taking of action on the emergency or urgent public necessity as an item to the agenda for a meeting for which notice has been posted in accordance with this subchapter, is sufficient if the notice or supplemental notice is **posted for at least one hour before the meeting is convened.**” That notice must clearly identify the emergency or matter of urgent public necessity.

Practitioner's Note: The emergency exception is something that needs to be invoked on the front end. The Open Meetings Act does not permit the government authority to go back and retrospectively declare a meeting that occurred in violation of the Act's meeting requirements to have taken place under the emergency exception.

What constitutes a sufficient emergency? An emergency or urgent public necessity **only** exists if immediate action is required due to imminent threat to public health and safety, or if there is a reasonably “unforeseeable” situation such as “fire, flood, earthquake, hurricane, tornado, or wind, rain, or snow storm, power failure, transportation failure, or interruption of communication facilities, epidemic, or riot or enemy attack.”

“The sudden relocation of a large number of residents from the area of a declared disaster to a governmental body's jurisdiction is considered a reasonably unforeseeable situation for a reasonable period immediately following the relocation.” Think mass relocation following hurricanes. While cities must comply with the Open Meetings Act, the Open Meetings Act does make allowance for the unforeseeable, and it's important to be aware so that the necessary mitigating measures can be carried out.

Reminder: The Texas Open Meetings Act allows for remote participation under emergency circumstances. While not restricted just to emergency or disaster situations, videoconference call as a remote participant is available where (1) a quorum of the governing body is physically present at one location, (2) the meeting notice specifies the physical location where a quorum of the governing body will convene, (3) a video or audio recording of the meeting is made for the public, (4) and all public portions of the meeting are visible and audible to the public, and (5) the location where the quorum of the board is convened has two-way audio-visual communication. Tex. Gov't Code § 551.127.

But in addition, Section 551.125 provides that an open meeting can be held via telephone conference call in the event of emergency or public necessity and convening at one location of a quorum is difficult or impossible. Tex. Gov't Code § 551.125.

Texas Disaster Act

Chapter 418 of the Texas Government Code, also known as the Texas Disaster Act, sets out procedures and grants certain powers in the event of emergency situations. This chapter includes procedures for rescue, restoration, and remediation in the face of emergency situations. Texas law vests the executive branch with the authority to declare an emergency. *See* Tex. Gov't Code § 418.014. The declaration of a disaster by the governor has the force and effect of state law. *See* Tex. Gov't Code § 418.012.

There are times when local government officials must also issue certain disaster and emergency orders to address local procedures, but local government entities must be mindful of any state-wide orders in the same field.

Over the last few years the COVID-19 pandemic led to a series of orders issued by the Governor's office. With those orders, however, came disputes between state and local government.

In *Abbott v. Harris Cnty.*, 672 S.W.3d 1, 15 (Tex. 2023), arose after the Governor issued Executive Order GA-38, which prohibited local governments from imposing mask mandates. A Harris County judge issued a directive allowing mask mandates

in courtrooms, which conflicted with the governor's order. The Texas Supreme Court ultimately reversed the lower courts' decisions, holding that GA-38, issued under the Texas Disaster Act, had the force of law and superseded any local orders, including those from the district court judge. The judicial branch will not second-guess the decision making of the governor with respect to disaster declarations.

In a related case, *Abbott v. Jenkins*, a Dallas County judge initially issued a temporary restraining order against the enforcement of GA-38, requiring masks in certain circumstances. 671 S.W.3d 960 (Tex. 2023). The Dallas County Commissioner sued the judge, and the governor was ultimately joined in the suit. The temporary restraining order was stayed by the Texas Supreme Court, and ultimately the order at issue expired. The case highlighted the ongoing tension between state and local authorities regarding emergency health measures

The controlling nature of the governor's order was also made clear in *State v. City of Austin*, No. 03-20-00619-CV, 2021 Tex. App. LEXIS 2651 (Tex. App.—Austin Apr. 8, 2021, no pet.). In December 2020, the City of Austin's mayor issued an order for restaurants to close New Year's Eve to discourage public gathering during the COVID-19 pandemic. The State of Texas sued the City of Austin and filed an application for temporary injunction, arguing that the City of Austin's order contravened the Governor's order regarding restaurant hours of operation. The Travis County District Court denied the request for temporary injunction, and the State immediately filed an interlocutory appeal and sought temporary relief from the Court of Appeals. The Third Court initially denied the State's request, and the State filed a petition for writ of mandamus directly with the Texas Supreme Court. The Supreme Court ordered the Third Court to issue temporary relief and enjoin enforcement of the local orders, which the Third Court of Appeals did. Ultimately, the appeal was dismissed because it was dismissed based on mootness (due to passage of time and the issuance of the new order from the Governor's office which superseded the prior order) and ripeness as to future conduct.

Practitioners' Notes: There are a couple of key tips/lessons to take away from these cases. The first is that when establishing emergency orders or rules in the face of an emergency, local governments should be aware of any relevant concurrent state or federal orders, including the extent of parameters.

The second is that while the passage of time might moot any challenge, to the extent there is a conflict between a local and state order covering an emergency situation, it is likely that a court will find that a local order is unenforceable to the extent it contravenes the state order.

Takings Liability

In reacting to a whole panoply of disasters, governments have found it necessary to use, take, or destroy private property. This dynamic dates to the founding struggle of the United States.

In *Respublica v. Sparhawk*, 1 U.S. 357 (Penn. 1788), the Pennsylvania Supreme Court considered a claim for compensation for 227 barrels of flour that had been moved by the government to a depot and later lost to the British. The court asked whether “by reason, by the law of nations, and by precedents analogous to the subject before us,” compensation could be awarded. The court answered in the negative on the ground that “the rights of necessity, form a part of our law.” *Id.* at 362. It explained,

Of this principle, there are many striking illustrations. If a road be out of repair, a passenger may lawfully go through a private enclosure. So, if a man is assaulted, he may fly through another's close. In time of war, bulwarks may be built on private ground. Houses may be razed to prevent the spreading of fire, because for the public good. We find, indeed, a memorable instance of folly recorded in the 3 Vol. of Clarendon's History, where it is mentioned, that the Lord Mayor of London, in 1666, when that city was on fire, would not give directions for, or consent to, the pulling down forty wooden houses, or to the removing the furniture, &c. belonging to the Lawyers of the Temple, then on the Circuit, for fear he should be answerable for a trespass; and in consequence of this conduct half that great city was burnt.

Id. at 363 (internal citations omitted).

This section provides some information on the constitutional and legal development over the past 358 years to answer the concern faced by the Lord Mayor of London in 1666.

Relevant constitutional and statutory provisions:

Federal Constitution: “. . . nor shall private property be taken for public use, without just compensation.” U.S. Const. Amend. V.

Texas Constitution: “No person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person,” Tex. Const. art. I, § 17.

Note: there are (maybe significant) differences between the two Takings Clauses. See *City of Baytown v. Schrock*, 645 S.W.3d 174, 182 (Tex. 2022) (Young, J., concurring). Specifically, “the Texas Constitution requires compensation for *more types of government action* than its federal counterpart” because ‘the obvious textual differences between the clauses’ unambiguously reflect our Framers’

determination to protect more than the Fifth Amendment does.” *Id.* (quoting *Jim Olive Photography v. Univ. of Houston*, 624 S.W.3d 764, 780 (Tex. 2021) (Busby, J., concurring) (internal citations omitted).

Private Real Property Rights Preservation Act, Tex. Gov’t Code ch. 2007: Defines a taking as “a governmental action that: (i) affects an owner's private real property,” and (ii) causes “a reduction of at least 25 percent in the market value of the affected private real property.” Tex. Gov’t Code § 2007.002(5).

Note: A claimant in a Chapter 2007 claim may only obtain an order invalidating the governmental action resulting in a taking. *See* Tex. Gov’t Code § 2007.023(b). However, in lieu of having its action invalidated, the governmental entity may opt to pay compensation for the property taken. *See id.* at § 2007.024(c).

Uniquely, Chapter 2007 has a “loser pays” provision. *See id.* at § 2007.026.

Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code ch. 101: waives governmental immunity for property damage, personal injury, and death proximately caused by the operation or use of motor-driven equipment or a condition or use of tangible personal or real property. *See* Tex. Civ. Prac. & Rem. Code § 101.021.

Takings liability that may arise in a disaster:

- Flooding. *Tarrant Reg’l Water Dist. v. Gragg*, 151 S.W.3d 546 (Tex. 2004) (releases from a dam during flooding events).
- Fire. *TrinCo Inv. Co. v. U.S.*, 722 F.3d 1375 (Fed. Cir. 2013) (addressing claim for takings compensation for destruction of timber by the Forest Service to fight a forest fire).
- War. *U.S. v. Caltex, Inc.*, 344 U.S. 149 (1952) (resolving claim for compensation for oil depot destroyed during the retreat from the Philippines to deprive access to invading Japanese forces).
- Crime. *Steele v. City of Houston*, 603 S.W.2d 786 (Tex. 1980) (holding claimant stated a takings claim where city set fire to a house to flush out escaped prisoners).
- Disease. *Darby Dev. Co., Inc. v. U.S.*, 112 F.4th 1017 (Fed. Cir. 2024) (holding that landlords stated a takings claim arising from CDC’s eviction moratorium in response to the Covid-19 pandemic).

Necessity as a defense to takings liability:

Federal Constitution: The Takings Clause does not require compensation for damaged or destroyed property when it was objectively necessary for government officers to

destroy or damage property in an active emergency to prevent imminent harm to persons. *See Baker v. City of McKinney*, 84 F.3d 378, 379 (5th Cir. 2023) (denying compensation to homeowner where the use of explosives and tear gas to extract fugitive caused significant damage to house); *see also* Derek T. Muller, “*As Much Upon Tradition as Upon Principle*”: A Critique of the Privilege of Necessity Destruction Under the Fifth Amendment, 82 NOTRE DAME L. REV. 481 (2006).

Texas Constitution: “Uncompensated destruction of property has been occasionally justified by reason of war, riot, pestilence or other great public calamity. Destruction has been permitted in instances in which the building is adjacent to a burning building or in the line of fire and destined to destruction anyway.” *Steele v. City of Houston*, 603 S.W.2d 786, 792 (Tex. 1980). The “great public necessity” defense has generally been construed to be more narrow than the federal necessity defense. *Galovelho LLC v. Abbott*, No. 05-21-00965-CV, 2023 Tex. App. LEXIS 6733, at *16 (Tex. App.—Dallas Aug. 29, 2023, pet. denied).

Texas Statutes:

- **The Private Real Property Rights Preservation Act** does not apply to “an action taken out of a reasonable good faith belief that the action is necessary to prevent a grave and immediate threat to life or property” or “an action that is taken in response to a real and substantial threat to public health and safety” that is “designed to significantly advance the health and safety purpose; and” “does not impose a greater burden than is necessary to achieve the health and safety purpose.” Tex. Gov’t Code § 2007.003 (7), (13).
- **The Texas Tort Claims Act** does not waive immunity to claims arising from “the action of an employee while responding to an emergency call or reacting to an emergency situation.” Tex. Civ. Prac. & Rem. Code § 101.055(2).

Reliance on experts:

Intent is an element of a takings claim. A taking cannot be established by proof of mere negligent conduct by the government. For takings liability to attach to a governmental action, the government must know that its specific act is going to cause an identifiable harm or know that the harm is substantially certain to result. *See Harris Cnty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 799 (Tex. 2016).

Reliance on experts eliminates intent. When a governmental entity relies on an expert’s opinion that an action will not damage or destroy private property, the factfinder cannot ignore that reliance without evidence that the government knew the expert’s opinion was false. *See City of Keller v. Wilson*, 168 S.W.3d 802, 829 (Tex. 2005).

Practitioner’s Note: Contemporaneous internal and external communications should be developed with *City of Keller* in mind.

Internally, procedures for reacting to disasters should expressly reference advice received from experts. Where applicable, those procedures may bear an engineer's seal or be signed by a public-health expert.

Externally, communications with the public should emphasize that the government is adhering to established procedures that were developed by experts. Bolstering the expert's credentials/credibility may be helpful, but the point is "we're not making this up as we go."

What about ultra-vires acts?

"Unlawful" actions by a government official may create takings liability: Even acts by a government agent that are unlawful can subject the government to takings liability if taking is chargeable to the government. *Darby Dev. Co., Inc. v. U.S.*, 112 F.4th 1017, --- (Fed. Cir. 2024) (citing *Great Falls Mfg. Co. v. Garland*, 124 U.S. 581, 597 (1888)). Such liability arises when the action is taken within the normal scope of the agent's duties. *See id.*

However, unauthorized actions for takings-claim purposes tend to be "outside the normal scope of the government officials' duties" or done despite an "explicit prohibition." *Del-Rio Drilling Programs v. U.S.*, 146 F.3d 1358, 1363 (Fed. Cir. 1998). Government officials' conduct "cannot be characterized as unauthorized merely because they may have been mistaken, imprudent, or wrongful." *Eyherabide v. U.S.*, 345 F.2d 565, 570 (Ct. Cl. 1965); accord *Hall v. McRaven*, 508 S.W.3d 232, 241–42 (Tex. 2017) ("When the ultimate and unrestrained objective of an official's duty is to interpret collateral law, a misinterpretation is not overstepping such authority; it is a compliant action even if ultimately erroneous.").

Regulatory takings in a disaster:

Non-physical regulatory takings are actionable: A regulatory taking is actionable only where it deprives the property of all economically viable use. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 (1992); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933 (Tex. 1998).

Regulatory takings in a disaster may be rare: "A compensable taking does not arise whenever state action adversely affects private property interests. Governments interfere with private property rights every day. Some of those intrusions are compensable; most are not." *Galovelho LLC v. Abbott*, No. 05-21-00965-CV, 2023 Tex. App. LEXIS 6733, at *16 (Tex. App.—Dallas Aug. 29, 2023, pet. denied) (rejecting takings claim of restaurant owner arising from Covid-19 restrictions) (quoting *Jim Olive Photography v. Univ. of Houston*, 624 S.W.3d 764, 771 (Tex. 2021)).

Public Communications

One of the biggest tools in managing a disaster or emergency is the public messaging. This includes the messaging regarding impending conditions and after-action debriefs. Front end messaging might for example include tips on how to prepare if power fails or there is a boil-water notice. Messaging in the aftermath might detail the measures taken to manage the event and resources for citizens to assist as they get back on their feet, such as local or state resources, or applications for FEMA assistance.

What to say/what not to say? Be mindful that no matter how adept an entity is at navigating an emergency, it is important to remember that no matter what the statement, even the most well thought out and artfully crafted statement won't guarantee that there is not going to be a suit.

With that, however, a helpful lens to through which you could view the statement is "if this press release/video/audio clip was attached to or embedded in a petition alleging that the City took a wrong turn, is there anything in here that would cause concern? Is there anything that would weaken or strengthen the city's defense? Running the public statement or thoughts regarding same by legal counsel is helpful in that exercise.

Emergency contracting

Section 418.107 of the Texas Government Code also allows local government entities to lend each other a helping hand by entering into mutual aid agreements. Further, cities "may make agreements for the purpose of organizing emergency management service divisions and provide for a mutual method of financing the organization of units on a basis satisfactory to the subdivisions." Tex. Gov't Code § 418.107.

Among the issues to consider when contracting for services related to an emergency is the pricing of those services. Unfortunately, some contractors will raise prices an exorbitant amount citing demand. And if contractors are price gouging in the wake of a disaster, what options are available to cities who need services? File a complaint with the Office of the Attorney General.

Additional Resources

There are also resources to assist municipalities and their citizens in the event of emergencies, including:

- State of Texas Emergency Assistance Registry, <https://www.tdem.texas.gov/response/state-of-texas-emergency-assistance-registry>

- Texas City Attorneys Association City Attorney Responding in an Emergency (CARE) Program, <https://www.tml.org/269/City-Attorneys-Responding-in-an-Emergency>
- Texas Division of Emergency Management, <https://tdem.texas.gov/>
- Federal Emergency Management Agency (FEMA), <https://www.fema.gov/>
 - FEMA Grants, <https://www.fema.gov/grants>
 - National Preparedness, <https://www.fema.gov/emergency-managers/national-preparedness>
 - Achieving Equitable Recovery: A Post-Disaster Guide for Local Officials and Leaders, https://www.fema.gov/sites/default/files/documents/fema_equitable-recovery-post-disaster-guide-local-officials-leaders.pdf
 - Risk Management, Tools for Hazard Resilience, <https://www.fema.gov/emergency-managers/risk-management>
 - Resources for Individuals and Communities, <https://www.fema.gov/emergency-managers/individuals-communities>
 - Know Your Risk: Community Officials, <https://www.fema.gov/flood-maps/know-your-risk/community-official>
 - Assistance After a Disaster, <https://www.fema.gov/assistance>
 - Disaster Authorities, <https://www.fema.gov/disaster/authorities>