



REMNANTS OF HARVEY

An explanation of a couple of court cases that showcase the law on inverse condemnation.

A holiday jingle composed by Howard M. Bookstaff, HAA General Counsel

(To the tune of "Santa Clause Is Coming to Town...")

*We survived the storm
We're cleaning debris
It's not the norm
But will make you see
Harvey is not getting us down*

*We're coming back fine
And may need a hand
But we have turned water into land
Harvey is not getting us down*

*Yes, there's still work to be done
Tenant claims and lawsuits true
We know its win or lose
So win we're assured to do!*

*Oh! We survived the storm!
We're cleaning debris
It's not the norm
But we'll make you see
Harvey is not getting us down!*

THE RAINS AND flooding associated with Hurricane Harvey have long since dissipated. However, we are continuing to deal with issues relating to the natural disaster. Residents who were displaced are continuing to search for permanent housing elsewhere. Property owners are dealing with insurance companies and FEMA. Rebuilding continues.

As anyone who lives on the west side of Houston can attest, one lingering issue in particular is with respect to the Barker and Addicks reservoirs releases into the Buffalo Bayou. The releases caused a number of properties to flood well after the storms ended.

The intentional releases of flood water has caused many property owners asking the question: Can I recover damages for my losses?

A number of lawsuits have been filed to determine whether, and to what extent, damages can be recovered. The purpose of this article is to provide information, not to litigate or analyze the issues with respect to pending cases. However, it might be beneficial for you to know the elements of inverse condemnation, likely the type of cause of action under which property owners would be seeking recovery.

The Texas Supreme Court has weighed in on this issue before. In 2004, the court ruled on a case styled Tarrant Regional Water District v. Gragg. In 2016, the court ruled on a case styled Harris County Flood Control District and Harris County, Texas v. Kerr, et al. Both cases involved analyzing the law on inverse condemnation. Let's look at the rulings in both cases.

Gragg Facts

In 1990, the Tarrant Regional Water District (TRWD) began releasing water for the first time from the Richland-Chambers Reservoir on the Trinity River about 8 miles upstream from the Gragg Ranch. The Gragg Ranch is one of the largest in East Texas, lying partly in Anderson County and partly in Freestone County.

The reservoir was not constructed to control floods but to supply water. Consistent with its intended function, the TRWD kept the reservoir as full as possible at a level only 2 feet below the overflow point.

In March 1990, extremely heavy rains caused extensive flooding throughout the Trinity Basin and the TRWD released water

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through the reservoir's floodgates for the first time. For the first time in its history, the Gragg Ranch suffered extensive flood damage. The flooding breached levee roads in several places, and gouged large sections of land out of the ranch's bottomlands.

The owner and tenant of the ranch sued the water district, alleging that its construction and operation of the reservoir had inversely condemned their property in violation of the Texas Constitution. After the reservoir was constructed and operations began, Gragg claimed, the nature of the flooding significantly changed and the ranch suffered extensive damage that it had never before experienced. Gragg claimed that post-reservoir flood effects made it economically infeasible to continue using the ranch as high-intensity cattle ranching operation.

The court held that the TRWD had inversely condemned a flood easement on the ranch and a jury found the difference between the market value of the ranch immediately before and after condemnation to be over \$10,000,000. Additional amounts were given to the ranch's tenant.

The 5th U.S. Circuit Court of Appeals affirmed the trial court's judgment and the case was appealed to the Supreme Court to determine whether the judgment was appropriate.

The court stated it seeks to ensure that the public does not bear the burden of paying for property damage for which it received **no benefit**.

Kerr Facts

The plaintiffs in the case consisted of more than 400 residents and homeowners in the upper White Oak Bayou watershed in Harris County. Their homes were built mostly in the mid-to-late 1970s and early 1980s. Despite a history of flooding in the area, they initially suffered little to no flood damage. This changed, however, when Tropical Storm Francis in 1998, Tropical Storm Allison in 2001 and an unnamed storm in 2002 flooded their homes one or more times. The homeowners blamed Harris County and Harris County Flood Control District, asserting that they approve new upstream development without implementing appropriate flood-control measures, and that they were substantially certain flooding would result.

In 1976, the Army Corp of Engineers prepared a report on the upper White Oak Bayou. It stated the flooding was caused primarily by inadequate channel capacities of the streams and that the problem was compounded by continuing urbanization of the fast-growing area. It was predicted that additional residential development is expected to occur with or without an adequate plan for controlling the floods.

The government entities concurred with the Army Corp of Engineers' findings, but federal funding was slow to materialize, even as thousands of acres were developed in the bayou's watershed and the county continued approving more development.

The delay in federal funding led county officials to develop their own flood-control plan. Their plan was to be funded through local taxes and impact fees, but it was never fully implemented.

The engineering reports confirmed that the government entities knew for several decades that development in the bayou's watershed exacerbates flooding in the upper bayou. The owners presented evidence that the County approved development without previously required on-site detention.

The government entities filed a plea to the jurisdiction and motion for summary judgment contending that there was no genuine issue of material fact on the elements of the takings claim. The trial court denied the motion, and the court of appeals agreed. The

Supreme Court initially heard the case and also agreed with the lower courts that the homeowners' suit should continue.

Notwithstanding the court's initial decision, the court agreed to rehear the case and now is, once again, deciding whether or not the case should continue.

Constitutional Basis for Claim

Article I, section 17 of the Texas Constitution provides:

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.

This is what is known as the "takings clause" in the constitution. The court stated that at the heart of the takings clause lies the premise that the government should not force some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

A physical taking may occur when the government physically appropriates or invades private property, or unreasonably interferes with the owner's right to use and enjoy the property. When the government takes private property without first paying for it, the owner may recover damages for inverse condemnation. But mere negligence that eventually contributes to property damage does not amount to a taking.

The court stated it seeks to ensure that the public does not bear the burden of paying for property damage for which it received no benefit.

Generally, plaintiffs seeking recovery for a taking must prove the government intentionally took or damaged their property for public use, or was substantially certain that would be the result. "Taking" cannot be established by proof of mere negligent conduct by the government. The court stated that a takings claim must be based on some affirmative act or action of the government.

The court has not recognized liability where the government only knows that someday, somewhere, its performance of a general government function, such as granting permits or approving plats, will result in damage to some unspecific parcel of land within its jurisdiction.

The court stated it has not held that the public-use element is met where the government does nothing more than approve plats or building permits for private development.

Gragg Wins

The court held that the evidence presented was legally sufficient to support the trial court's findings that the reservoir caused recurrent destructive changes in flooding characteristics that directly impacted the Gragg property such that it was no longer usable for its intended purpose and was taken. The court also found nothing reversible with the jury's compensation award. Accordingly, the court affirmed the previous judgment.

Kerr Loses

The court stated the governmental entities that engaged in flood-control efforts were not liable to the homeowners. The only affirmative conduct by the governmental entities that allegedly caused the flooding was approval of private development. Additionally, the flooding resulted from multiple causes, including act of God and activities of private developers. At most, the governmental entities were aware of a risk that properties in the White Oak Watershed somewhere, someday would flood. However, this, in the court's view, did not give rise to a takings claim. Accordingly, the court reversed the judgment of the court of appeals and rendered judgment dismissing the homeowners' case.

Conclusion

The two opinions show both sides of the coin. In the Gragg case, the court allowed the ranch owner to prevail on an inverse condemnation claim when the flooding was the result of the reservoir's construction and operations. In the Kerr case, the court denied homeowners an inverse condemnation claim when the court determined that the government entities engaged in flood-control efforts and, at most, were guilty of approving private development knowing there was a risk of flooding.

It will be up to the courts to determine, based upon whatever evidence is presented by the parties, whether and to what extent recovery is available as a result of the reservoir releases connected with Harvey. There may be several difficult questions to be addressed by court including the intent of the government entities involved, whether affirmative action caused the flooding and whether the taking was for a public use. Hopefully this gives you some understanding of the issues as these cases progress through the court system. 

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