EVOLUTION OF LIABILITY FOR FLOOD DAMAGES: WHERE ARE WE NOW?

By J. Palmer Hutcheson

ABOUT THE AUTHOR

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Changing weather patterns and several recent catastrophic storms have highlighted the collision between urban redevelopment, suburban expansion, "sunbelt" or "greenfield" growth, and changing governmental philosophies regulating drainage. A population explosion in the Gulf Coast area has exponentially magnified problems with urban sprawl and severely taxed existing drainage and storm water infrastructure resources. Increased demands for commercial and residential housing necessitate funding and building additional flood and storm water control structures. When a neighborhood floods, companies that were engaged in newer upstream commercial and residential real estate development, manufacturing and industrial expansion or modification, property management, design engineering and construction become targets for criminal and civil litigation. While governmental units responsible for drainage management are often able to assert sovereign immunity and other legal protections to limit or eliminate their exposure, developers, engineers, builders, and manufacturers are faced with the task of defending themselves in costly litigation against whole neighborhoods.

These neighborhood suits routinely raise complex practical and legal issues regarding the use, ownership, drainage and disposal of water. They are often complicated by antiquated flood control policies or con-

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flicting flood plain and storm water management issues, political tug-of-wars, lack of public financing, governmental immunity defenses and scientific data gaps. At the same time, protection of the environment and real property interests compete at the courthouse regarding land and water use. The result is a growing number of costly claims and lawsuits concerning construction, engineering, drainage, flooding, wetlands destruction, downstream water rights, and water quality.

As with many areas along the Gulf Coast, Houston's (Harris County's) original drainage philosophy was 100 percent "conveyance" or channelization (e.g. "get it to the bayous, then the bay as fast as we can, in big concrete ditches"). Over time, as the capacities of local bayous were met or exceeded, the County started mandating onsite detention ponds to temporarily restrain floodwaters. However, as the City of Austin and many other locales have learned the hard way, a mandatory 100 percent detention philosophy can be catastrophic when it is not closely coordinated and planned—it simply delays the tidal wave. It is far too simplistic to say that one of the two philosophies is right and the other is wrong. In situations where subdivisions are near a large channel, it may be smarter to channelize that runoff so it is out of the way quickly before a larger upstream surge occurs. So, detention may not be the "correct" answer for subdivisions closest to existing bayous or channels. Locally, Harris County has a mixture of subdivisions, some with channels, others with detention ponds. Therefore, in reality, a blending of these two philosophies is necessary in our area and drainage must be coordinated and administered by a single governing authority.

Recently, two Texas appellate courts seized opportunities to begin to clarify the "murky" waters about flooding compensation issues that have plagued developers, engineers, builders and governmental units (including Harris County) throughout the Gulf Coast region. The Houston First Court of Appeals addressed the issue of a County's liability under the theory of "inverse condemnation" and the Fort Worth Court of Appeals addressed the issue of a developer's or engineer's liability when a local governmental entity exercises pervasive control over local drainage plans.

THE KERR AND ANELLO SUITS: THE COUNTY'S LIABILITY

Inverse Condemnation

Very recently the Houston First Court of Appeals issued a watershed opinion stemming from the flooding of White Oak Bayou in Houston during Tropical Storm Frances. Following the storm, two groups totaling over 525 homeowners filed the Kerr and Anello suits in Harris County state court, claiming their homes were "taken" under the legal theory of "inverse condemnation." The homeowners claimed Harris County was liable for their flood damage because it continued to permit upstream development even though it knew that in the stretch of the Bayou where their homes were located, there was insufficient storage capacity to contain the expected increase in storm water runoff from the development activities (at least until they finally built regional detention ponds to be funded by impact fees—see discussion below). The homeowners claimed that their homes were effectively "condemned" by Harris County's decision to allow the upstream development.

According to the homeowners, the developers should have installed onsite detention ponds to temporarily detain the storm water and then dribble it downstream, which, if properly coordinated, minimizes the "tidal wave" effect of unrestrained channelization.

Impact Fees—Are they the answer?

Instead, the Harris County Flood Control District (now Harris County Public Infrastructure Department) collected "impact fees" (also known as "in lieu" fees) from the developers. These impact fees were earmarked to dig large regional detention ponds. The homeowners claim that the County's failure to promptly dig the large-scale ponds caused the floodwaters to essentially turn their neighborhoods into detention ponds. According to Harris County, the supplemental funding needed to build the detention ponds was never appropriated.

One explanation given for Harris County's failure to appropriate the required funds was that the various County commissioners and taxing-authorities placed a practical (political) ceiling on all taxes combined and then "prioritized" the tax pie. Flood control drew the short straw and received far less funding than necessary to timely dig regional detention ponds.

Given extreme political pressures placed on existing tax revenue sources at all levels of government, many local communities have turned to impact or "in lieu" fees to finance new drainage infrastructure and many other types of capital improvements. Considerable disagreement exists over their effectiveness. These fees have been authorized by statute in about half our states, including Texas. Fees collected in lieu of requiring on site drainage improvements are, by law, earmarked to construct infrastructure to accommodate the new development, but there is usually a significant lag time between collection of such fees and construction. Even worse, there is considerable uncertainty regarding collection of the remaining funds necessary to construct this infrastructure. So these improvements do not get built in a timely fashion, and when flooding occurs in the interim, they afford questionable protection from flooding liability claims for everyone involved in the process.

Impact fee statutes usually provide that if the fees are not used to construct the contemplated improvement within a stated number of years, they will be refunded. What protection does this refund provision really give to the developer who has finished the development? We are aware of instances where the regional drainage authority never built the improvement and, years later, refunded the fee, simultaneously demanding the developer retrofit on site detention! Aside from constitutional issues, it will likely be impractical, if not impossible, to retrofit a residential or commercial development at this late stage.

SOVEREIGN IMMUNITY AND "INTENTIONAL TAKING" ISSUES

The County is, for the most part, immune from negligence liability claims under sovereign immunity. Harris County took the position in Kerr that as long as they continued (however slowly) to implement their regional detention pond plan and did not purposefully intend to flood anyone, their interim, de facto appropriation of Plaintiffs' neighborhoods as surrogate detention ponds, even if negligent, was not an "intentional" taking. Thus, Harris County argued that they were not liable for condemnation damages. The trial court agreed and dismissed the inverse condemnation claims against Harris County ruling that Tropical Storm Frances's flooding was an unforeseeable act of God and that a single catastrophic flood did not amount to evidence of intent to condemn. Consequently, Harris County was found not liable under a nuisance theory either.

The Kerr case was ruled upon first, and then was appealed. Although the Houston appellate court held that as a consequence of a single, catastrophic flood event such as Frances (and, more recently tropical storm Allison, which dumped over three feet of rain on central Houston two years ago), the homeowners' property had not been forever "taken" by the County (so homeowners could not recover the entire value of their properties), they had nevertheless been "damaged"; consequently homeowners could recover damages from this single flooding event if they proved that Harris County was or should have been "substantially certain" flooding in this neighborhood would result from changing its drainage projects currently underway in that watershed when the storm hit. Texas' Constitution protects property from being unlawfully "damaged" in addition to protection for unlawful "taking" which permitted this award for a single event flood. These fact issues remain to be tried after the case was sent back to the trial court.

The County also claimed that tropical storm Frances was an unforeseeable act of God that precluded any defendants' liability, but the appellate court, citing testimony of conflicting experts as to the magnitude and foreseeability of this rainfall event based upon all historical records in this watershed, ruled a fact issue was raised that would require a jury's determination. So this issue remains to be tried. Dicta in the appellate opinion, if strictly followed, would preclude summary judgment ever being awarded based on the "act of God" defense, absent a "Noah's Ark" flood.

THE STATUTE OF REPOSE

Another issue highly important to developers, engineers and homeowners in flood damage cases involves the defense afforded by Texas' "statute of repose." Like similar laws in many other states, Texas' statute of repose absolutely bars claims against engineers for improvements that were

"substantially completed" more than 10 years before a suit is filed. The question then becomes one of timing—when does the 10-year limitation begin? With respect to multi-phase planned communities, homeowners claimed that it does not begin until the last sequential phase or section of a multi-phase planned community is finished. This liberal construction, if adopted by the Courts, would create even more uncertainty and extend the tail on the liability dog for periods well beyond 10 years. Fortunately, the Houston appellate court in Kerr ruled that, insofar as multi-phase developments are concerned, the 10-year clock starts to run as soon as each section's drainage is substantially completed. This is welcome news to developers and engineers, who should not remain "on the hook" perpetually.

THE KELLER SUIT: DEVELOPERS' AND ENGINEERS' LIABILITY SUPERCEDED

In City of Keller v. Wilson, 86 S.W.3rd 793 (Tex. App.-Ft. Worth 2002, no pet.) the Fort Worth appellate court held for the first time that a City's or County's exercise of sufficient detailed and mandatory control over a developer's or engineer's proposed drainage design and implementation acts as a superceding, independent, sole cause of homeowners' damages and thus severs allocation of any legal causation to the developer or engineer for downstream impacts. In Keller, the developer was required to comply with the drainage philosophy and master drainage plan of the City as a condition of development. The development plans were prepared to comply with these requirements. The City, in conjunction with its outside engineers, reviewed and approved the plans. The City owned the downstream drainage easement at issue and was required to maintain it. The City had the sole and exclusive right to control the easement, the channel constructed thereon and the water flowing through the channel. Because the exclusive right to control drainage within its city limits rested exclusively with the City of Keller, the developer could do nothing more than comply with the drainage requirements of the City. Since the undisputed evidence in Keller showed that the developer complied with all of the City's requirements, the developer was held not to be liable.

The Keller Court specifically held that if a governing authority (for example, the City of Keller or Harris County) reviews the drainage plans, mandates changes from the original drawings, eliminates proposed onsite detention and, instead, requires the developer to employ specific drainage plans to meet the governing authority's master drainage plan and specified statutory drainage criteria, then such exercise of control can, legally, eliminate potential liability of a developer or engineer. Although Keller was very fact specific, it will be argued broadly in future cases that the City or County's stringent exercise of control over a specific drainage plan may cut off a builder's or developer's liability under theories of wrongful diversion of surface water, negligence, nuisance and similar claims.

BEWARE OF CONTRACTUAL INDEMNITY LIABILITY

One issue not specifically addressed in City of Keller concerns the statutory and contractual liability that may be imposed on homebuilders and developers through city ordinances that require, as a condition for procurement of building permits or plat certification, that the developer provide a letter to the issuing authority indemnifying them for any claims for flooding for "X" number of years following plat approval. Developers and their design engineers who frequently spearhead the interfacing of permitting with the local drainage authorities may neither be aware of, nor fully appreciate the risks involved with this circular liability risk. Frequently the land development department negotiates the engineering and platting without consulting in house counsel on such "routine" matters. So counsel for developers and homebuilders should be alert to this often overlooked risk and alert their outside and in house drainage design engineers and land development departments to consult with the legal department before routinely signing any such letter. Had such an indemnity agreement been required by the City of Keller, it is conceivable that despite the developer's purported independent misconduct being causally severed by the intervening dictates of the city's drainage design engineers, the developer might nevertheless have incurred indirect, indemnity liability for the drainage designs dictated by the City.

MANY ISSUES STILL REMAIN FOR HARRIS COUNTY

In Kerr, homeowners alternatively sued a number of upstream developers and engineers, claiming that if Harris County Flood Control District was not liable under a condemnation theory, then these upstream developers, despite having timely paid impact fees as provided by Harris County Flood

Control District regulations, were still liable under theories of negligence and common law and statutory nuisance. The developers and engineers argued that if flooding occurred, then any purported negligence or other wrongdoing of the developers and engineers was cut off by the sole conduct of the County, which prescribed the "impact fee" alternative and dictated the local flood control policies through its implementation of flood control regulations.

Since most of the developers and engineers resolved the homeowners' claims very early on in Kerr, the precise issue of whether Harris County's control of specific drainage plans and flood control policies excuse developers' and engineers' purported misconduct was not decided. Before Keller, prior Texas cases usually held that simple compliance with a jurisdiction's drainage ordinances is not enough to excuse a developer or engineer from potential civil liability for causing flooding under theories of negligence, nuisance, and wrongful diversion of surface water. Keller certainly provides developers and engineers with guidance on how to try to minimize their risks going forward. It is probable that courts will address these defenses on a very fact specific case-by-case basis.

If not further appealed, a fact finder must resolve several remaining factual issues in Kerr. If the County appeals the intermediate appellate court's decision to the Texas Supreme Court, that Court can affirm, modify or completely overturn the intermediate appellate court's decision in Kerr.

Interestingly, the day the Kerr appellate court held the County might be held liable for flooding damages, Houston City Council passed a law setting up an account that permits the City to charge Houstonians with a relatively nominal fee to fund drainage improvements. A hotly contested mayoral election in the interim caused considerable debate over this new "tax" and, ultimately, the "tax" was withdrawn.

Regardless of the outcome of ongoing litigation, Harris County has undertaken significant efforts to solve the problems uncovered by such storms as Tropical Storm Frances and Tropical Storm Allison through the Tropical Storm Allison Recovery Project ("TSARP"—see www.tsarp.org), whereby FEMA and Harris County are remapping the floodplains and re-evaluating flooding risks. They plan to issue new FEMA flood maps for the County in March 2004. These maps are said to be much more precise and reliable than prior maps and are likely to increase the size of the regulatory flood plain. This web site should be visited periodically for further updates.

CONCLUSION

The sovereign immunity-based defenses for governmental entities may not preclude civil damages liability for local bodies charged with administration of flood control in instances where the government knew or is found to have known that their activities were substantially certain to cause damage to adjacent homeowners. Those who suffered flood damage may no longer need to prove a statutory "taking" under an inverse condemnation theory in order to recover for damages for specific flooding events in Texas. Texas courts have finally recognized that, in cases where the developer strictly complies with or even modifies its drainage plans to comply with local governmental drainage dictates, tort damages responsibility should rightfully lie with those in charge of the drainage design, and perhaps not the developer. Impact or "in lieu" fees do not necessarily offer full civil liability protection to developers or governmental entities, as many have heretofore been assumed. As cities become more debt-burdened, impact fees will continue to be favored as a primary source of funding for new infrastructure. Those who decide to pay impact fees should be mindful of their full legal consequences.