

Can Homeowners Sue Local Public Entities for Flood Damage?

Amundsen Davis Government Entities Alert
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In Illinois, our Supreme Court recently held that a temporary flooding of a person's home may be a compensable taking under the Illinois Constitution. See *Hampton v. Metro. Water Reclamation Dist. Of Greater Chicago*, 1198612016 WL 3653963 (Ill. July 8, 2016). This type of taking allows for homeowners to receive just compensation from the government when they are being deprived of the use of their home.

In *Hampton*, plaintiffs were landowners who brought suit against the defendant, the water reclamation district, in Cook County Circuit Court alleging property damage resulting from flooding and asserting an unjust taking. Plaintiffs claimed that the flooding of their property was a result of the defendant diverting storm water into nearby creeks. Plaintiffs believed that the flooding constituted a taking because they came as a direct result of the defendant's actions, and required just compensation.

The defendant filed a motion to dismiss based on *People ex rel. Pratt v. Rosenfield*, 399 Ill. 247 (1948) arguing that a temporary flooding can never constitute a taking under the Illinois Constitution. However, the motion was denied by the trial court which relied upon a recent U.S. Supreme Court holding that a temporary flooding can constitute a taking under the federal constitution. See *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012). The Circuit Court certified the question 'Does the Supreme Court's holding in *Arkansas Game & Fish Comm'n* overrule the Illinois Supreme Court's holding in *Pratt* that a temporary flooding is not a taking?'

The appellate court held that *Arkansas Game & Fish Comm'n* overruled *Pratt* allowing for a temporary flooding to be considered a taking. The defendant petitioned for leave to appeal with the Illinois Supreme Court, which was granted. The Illinois Supreme Court held that a taking is the same under both federal and state constitutions and that temporary flooding could be compensable as a taking.

What does this mean for you?

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Before *Hampton*, a plaintiff could never successfully argue that a temporary flooding is a taking in Illinois. After *Hampton*, the Illinois Supreme Court held that through *Arkansas Game & Fish Comm'n* each taking by government-induced temporary flooding would be looked at individually to see if it 'radically interfered' with plaintiff's use and enjoyment of their property.

If a taking is established, then the plaintiff will still need to get past governmental immunity. Generally, municipalities are immune from liability if they develop a plan to deal with the excess rainfall and follow that plan. Municipalities are even immune if they choose not to develop a plan. The choice is discretionary and therefore protected through immunity. However, municipalities are not immune if they decide to deviate from their discretionary choice.

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