

## STORMWATER FLOODING COULD LEAD TO TAKINGS AND DAMAGE CLAIMS AGAINST ILLINOIS MUNICIPALITIES

The Illinois Supreme Court has ruled that temporary flooding may constitute a taking under Illinois law. *Hampton v. Metropolitan Water Reclamation Dist. of Greater Chicago*, No. 119861, 2016 WL 3653963. In *Hampton*, Plaintiffs filed separate complaints, later consolidated, against the Metropolitan Water Reclamation District of Greater Chicago (the “District”), regarding flooding damage to their properties which they allege occurred due to the District’s diversion of storm water into nearby creeks. The Plaintiffs alleged that the District caused creeks to overrun their banks, sewers to back up and flooding of their homes by diverting water to manage a heavy rainfall in 2010. The Plaintiffs asserted that the resulting property damage caused by the flooding, as well as the fact that some members of the class were deprived of use of their property, constituted a violation of the taking clause of the Illinois State Constitution and therefore they were entitled to just compensation. The question posed on appeal was whether *Arkansas Game and Fish Comm’n v. U.S.*, 133 S. Ct. 511 (2012) (holding that a temporary flooding can constitute a taking under the federal constitution) overrules the Illinois Supreme Court’s holding in *People ex rel. Pratt v. Rosenfeld*, 399 Ill. 247 (1948) (holding that temporary flooding can never constitute a taking under the Illinois Constitution). The Court reconciled the holdings and held that *Arkansas Game* did not overrule *Pratt* and adopted *Arkansas Game*’s reasoning into Illinois law.

The Court first looked to whether the definition of a taking under the U.S. and Illinois Constitutions are “synonymous” and found that, while the Illinois takings clause was more expansive in that it included damages, the definition of “taking” under both federal and State law was the same. In coming to its conclusion, the Court found that Illinois case law, the intent of the framers at the Constitutional Convention of 1870, and Illinois custom and practice, all indicate that a “taking” under Illinois law should be interpreted identically to federal law and thus U.S. Supreme Court decisions were relevant to their analysis. The Court then

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reasoned that the conclusions in *Pratt* and *Arkansas Game* were consistent in that neither imposes a bright line rule or exception concerning temporary flooding and each indicates that courts must determine whether a violation of the takings clause occurred on a case-by-case basis.

In addressing the question of whether the Plaintiffs sufficiently pleaded a violation of the Illinois takings clause, the Court looked to three factors set out by the Court in *Arkansas Game*: “The time and duration of the flooding; whether the invasion of the property was intentional or whether it was a foreseeable result of an authorized government action; and the character of the land and the owners reasonable investment-backed expectations regarding the land’s use.” Finding that the Plaintiffs had not sufficiently pleaded any of the *Arkansas Game* factors in their complaint, the Court, under the more broad Illinois takings clause, then looked to whether the Plaintiffs were entitled to compensation for the damage to their property. Noting that it was limited to the question of what constitutes a “taking”, the Court remanded the case for a determination regarding whether the Plaintiffs made a sufficient claim for compensation for damaged property under the Illinois takings clause.

**Practice Pointer:** The holding in *Hampton* could open municipalities up to takings and compensation claims if they engage in storm-water management practices that result in damage to private property.



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