



# Ready for the Defense

By Jay S. Judge, Kathryn Mary James, Robert Hoban and Dustin Fisher  
Judge, James, Hoban & Fisher, L.L.C.

## When Can Flooding of Private Property be an Unconstitutional Taking: Supreme Court Hampton

**T**HIS MONTH'S COLUMN, discussing the recent Supreme Court *Hampton v. Metropolitan Water Reclamation District of Greater Chicago*, 2016 IL 119861 (2016), case set out the test used to determine when flooding of private property allegedly caused by government constitutes an "unconstitutional taking of property without just compensation." It provides guidance to local public entities on the issue of whether and when it can be liable for flooding. While flooding of private property is an "act of God" or "act of nature," plaintiffs often sue local government for damages from flooding, claiming local government did not prevent flooding or did something that caused flooding.

The Supreme Court, in *Hampton*, found the flooding involved did not constitute a "taking of private property." And, the *Hampton* Court set out a 4-part test used to determine an "unlawful taking of property" and "unlawful damage to private property." It is a test local government must know to determine whether it breached the Illinois Constitution, which provides:

"Private property shall not be taken or damaged for public use without just compensation as provided by law."

The holding in *Hampton* may be summarized as follows:

*Hampton v. Metropolitan Water Reclamation District of Greater Chicago*, 2016 IL 119861 (2016) (*Arkansas Game & Fish* does not overrule *Pratt* as Appellate Court ruled, but *Arkansas Game & Fish* and *Pratt* both hold that temporary flooding can be a "taking" under Federal and State Constitutions only when the property owner's use and enjoyment of his property is radically interfered with, effectively destroyed or impaired in its usefulness).

In *Hampton*, homeowners from Bellwood, Hillside and Westchester sued the Metropolitan Water District,

claiming their home flooded and experienced sewer back-ups during heavy rains on July 23 and 24 of 2010 because the Water District closed certain locks, causing water to back-up and flood their property.

Plaintiffs sued, claiming the actions of the Water District caused a "taking" of their property in violation of the Illinois Constitution prohibiting the "taking" of private property for government use without just compensation.

In *Hampton v. Metropolitan Water Reclamation District of Greater Chicago*, 2016 IL 119861 (2016), the Illinois Supreme Court reversed the Appellate Court, which held that *Arkansas Game & Fish Commission v. United States*, 133 S.Ct. 511 (2012), overruled the Illinois Supreme Court decision in *People ex rel. Pratt v. Rosenfield*, 399 Ill. 247 (1948). The Supreme Court looked to the "takings" clauses in the State and Federal Constitutions ("private property shall not be taken for public use without just compensation") and found they were identical on the "taking of private property" clause.

The Illinois Supreme Court found that neither *Arkansas Game & Fish* nor *Pratt* established a bright-line rule that temporary flooding is not a "taking." Rather, both cases held that where temporary flooding radically interferes with and effectively destroys or impairs the usefulness of the private property, there can be a "taking."

The Illinois Supreme Court found that neither the U.S. Supreme Court in *Arkansas Game & Fish* nor its own decision in *Pratt* (Ill. S.Ct.) hold that temporary flooding can never be a "taking" of private property for government use without compensation, but, rather, they both hold that temporary flooding can be a "taking" if it radically interferes with and effectively destroys the usefulness of the property. The *Pratt* Court explained:

Neither *Arkansas Game & Fish Comm'n* nor *Pratt* imposes a bright-line rule or exception regarding whether temporary flooding constitutes a taking. 133 S.Ct. at 519 ("No decision of this Court authorizes a blanket tempo-

rary-flooding exception to our Takings Clause jurisprudence, and we decline to create such an exception in this case.’). Both indicate that courts must look to the facts of each case to determine whether the property owner’s use and enjoyment of the property has been diminished or destroyed. Therefore, these cases are consistent, and both decisions should inform Illinois courts when addressing takings claims based on temporary flooding. (2016 IL 119861 at Par. 22.)

Therefore, under *Pratt* and Illinois law, temporary flooding constitutes a “taking” of private property only when the property owner’s use and enjoyment of his property is radically interfered with, effectively destroying or impairing its usefulness.

### **The 4-Part “Taking” Test Adopted By The Illinois Supreme Court**

The Illinois Supreme Court, in *Hampton*, found that the 4-part test to determine an unconstitutional taking of private property in *Arkansas Game & Fish* would be the test used in Illinois to determine a “taking.” That test is as follows:

- (1) the length of time of the physical invasion;
- (2) the degree to which the invasion is intended or is the foreseeable result of authorized government action;
- (3) the character of the land at issue and the owner’s reasonable investment-backed expectations regarding the land’s use; and
- (4) the severity of the interference.  
(2016 IL 119861 at Par. 25.)

The Supreme Court, in *Hampton*, reversed the Appellate Court decision and found no “taking,” but remanded the case to the trial court to determine if there was unconstitutional damage to property for public use without just compensation in violation of the Illinois Constitution.

The Supreme Court offered guidance to the trial court in determining whether or not there was unconstitutional damage to property, stating the 4-part “takings test” should be used to determine whether there is “damage without compensation.” The Court wrote:

Property is considered damaged for purposes of the takings clause if there is ‘any direct

physical disturbance of a right, either public or private, which an owner enjoys in connection with his property; a right which gives the property an additional value; a right which is disturbed in a way that inflicts a special damage with respect to the property in excess of that sustained by the public generally.’ ... Where no property is actually taken, an owner of damaged property may assert a right to compensation in an action at law. ... Whether claimed by the owner as a plaintiff in an action at law or as a defendant in an eminent domain proceeding, ‘the right to damages is the same and is based on the [takings clause].’ (2016 IL 119861 at Par. 27.) (Emphasis added.)

### **Comment On Application Of Hampton**

There are several factors to be considered when deciding whether the *Hampton* case applies in a case involving a claim for either: (1) an unconstitutional “taking of property for government use without just compensation;” or (2) unconstitutional “damage to property for government use without just compensation.”

- (1) First, what is the cause of the flooding: (a) heavy rains flooding big areas; or (b) the local government entity blocking a culvert, etc.?

It is the unusual, unexpected heavy rains, beyond capacity of rivers, lakes and streams to hold, to which the rule of *Hampton* applies—where it is charged that local government should have done something to prevent flooding.

- (2) Secondly, on the *Hampton* 4-part test used to determine whether there is an unconstitutional “taking” or “damage to private property,” the most important factor of the four is: the degree to which flooding was “intended” or “foreseeable” by local government for its action or inaction.
- (3) Thirdly, there likely will be a Tort Immunity Act defense, usually § 2-201, discretionary immunity or judgment-call immunity, of the Tort Immunity Act (745 ILCS 10/2-201).

§ 2-201 discretionary immunity is as follows:

#### **10/2-201. Determination of policy or exercise of discretion**

§ 2-201. Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or



the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused. (745 ILCS 10/2-201.)

The Tort Immunity Act grants immunity for constitutional violations as follows.

The Tort Immunity Act also defines “injury” as used in § 2-201. “Injury” means, in pertinent part, as follows:

**10/1-204. Injury**

§ 1-204. Injury means death, injury to a person, or damage to or loss of property ... Injury includes any injury alleged in a civil action, whether based upon the Constitution of the United States or the Constitution of the State of Illinois, and the statutes or common law of Illinois or of the United States. (745 ILCS 10/1-204.)

- (4) Fourthly, the following two flooding cases find-  
ing no liability under § 2-201, discretionary

immunity, which may be helpful as a defense in flooding cases, are as follows:

- (1) *Nichols v. City of Chicago Heights*, 2015 IL App (1st) 122994 (1st Dist. 2015) (City immune from liability per § 2-201 discretionary immunity for backup of sanitary sewer system flooding ten homes in heavy rains as City Council made policy determinations on how best to operate and maintain sanitary sewer system designed to handle less than a 50-year storm as no law prescribed the precise manner to do so and decisions on how to do were unique to City Council).
- (2) *In re Chicago Flood Litigation*, 176 Ill.2d 179, 680 N.E.2d 265 (1997) (City protected from liability by § 2-201 discretionary immunity for its decisions in deciding when and how to repair underground tunnel leak caused by contractor and whether and how to warn of tunnel breach).



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