



Court Dismisses Takings and Tort Claims Based on Flooding

By: Brandon Lemley, Querrey & Harrow, Ltd.

As the pandemic-related lockdowns began to ease in the summer of 2020, a bowling alley went to reopen, only to discover that its basement had flooded with over 6 feet of water—destroying all mechanicals for the building and causing more than \$125,000 in damage.

The backup was caused by a significant break in a storm sewer main located so close to the bowling alley that water leaking from the broken main became trapped within the building's drain tiles.

To plead constructive notice, the complaint attached several years' worth of five-year capital improvement plans, showing that the Member had intended to replace and expand this specific sewer as part of an anticipated joint road construction project with the county (which had jurisdiction over the road). Those same five-year plans showed the anticipated storm sewer project was delayed, and that other storm sewer projects were moving forward sooner. The complaint asserted tort claims for damages as well as inverse condemnation for an alleged taking of the property through flooding.

Through motions to dismiss, the Member was able to convince the Court first that the singular sewer backup was not a taking, and second that discretionary immunity applied.

The Member convinced the Court that the flooding was a tort but not a taking, because "accidental, unintended injuries inflicted by governmental actors are treated as torts, not takings." *In re Chicago, M.S.P.R. Co.*, 799 F.2d 317, 326 (7th Cir. 1986). The Court also found that the factors adopted by the Illinois Supreme Court in *Hampton v. Metropolitan Water Reclamation Dist.*, 2016 IL 119861 and interpreted in *Tzakis v. Maine Township*, 2020 IL 125017 did not support a taking because only one flood occurred, it would not reoccur because the Member repaired the main, the water was only in the basement for a few weeks, the flood damage had been adequately repaired, and the flood was neither intentional nor the foreseeable result of authorized governmental action.

Subsequently, the Member convinced the Court that all tort claims were barred by the Tort Immunity Act's discretionary immunity provision, 745 ILCS 10/2-201. The Court held that because the Member had articulated strategies in its five-year capital improvement plans to replace and expand the storm sewer in this location, the fact that the project was delayed turned on the discretionary balancing of interests by the Village against a limited budget. The Court found that under *Nichols v. Chicago Heights*, 2015 IL App (1st) 122994 (another case involving balancing interests in repairing and maintaining sewer mains), the Member's decisions were discretionary in nature, rather than ministerial. The Member was able to achieve a complete dismissal of all claims asserted against it in the lawsuit.