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INCORPORATING STOCK TANKS, DAMS & WETLANDS INTO SUBURBAN SPRAWL

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I. THE CHALLENGE

More and more developers are:

(1) purchasing property with small livestock dams and developing property around the lakes and/or incorporating these stock tanks into stormwater drainage systems. Implemented properly, this first phenomenon requires permits, and perhaps encumbrances on the lots impacted by the impounded water. Failure risks financial liability for developers, owners of the affected lots, and in many instances, property owners associations.

(2) "stacking" developments on top of each other hydrologically, channeling stormwater runoff through multiple, differently engineered developments before it drains into the permanent water feature such as a creek, large river, or large reservoir with controlled discharges. This second phenomenon increases the risk of physical damage to stormwater management features in the developments situated closer to the major water drainage feature, many of which are owned and maintained by a governmental entity or property owners association.

(3) locating new developments downstream of existing dams. This third phenomenon may be the most risky of the three because it puts both life and property at risk of injury. This phenomenon is also the most likely of the three to be overlooked by both planners and developers. Upon breach of the dam, this phenomenon risks property damage to individual houses and other structures in the path of the discharged water, and the souls of the humans who may simply happen to be in the wrong place at the wrong time. The destructive power of such a water discharge may also cause the failure of downstream dams, and other flood management control structures.

Texas' combination of geography, geology, climate, and rapidly growing population is causing a greater propensity for flooding. While we are all familiar with the risks and dangers of developing in a 100 year floodplain, these three noted phenomena are bringing about the slow but sure realization that the very same risks and dangers may exist in densely populated urban, suburban and even exurban areas far outside the floodplain boundary. And experience is also teaching us that determining how to reduce these risks is best analyzed in the context of an entire watershed or sub-basin, not on the individual development basis which has dominated our state's development history.

II. APPLICABLE REGULATIONS

The focus of this paper is actually fairly narrow. It addresses incorporating already-existing water features into new development. In most instances, water features such as creeks, rivers, and wetlands came into existence naturally, stock tanks were constructed for domestic and livestock use, and were otherwise used in a manner that allowed them to be exempt from state permitting requirements.

This paper does not address situations where a developer seeks to create completely new

"amenity ponds" a/k/a "vanity ponds" or, in parts of West Texas, a tragic "waste" of a valuable resource.

The cornerstone legal principle in this area is the principle of surface water ownership (emphasis added):

> *STATE WATER. (a) The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.*
>
> *(b) Water imported from any source outside the boundaries of the state for use in the state and which is transported through the beds and banks of any navigable stream within the state or by utilizing any facilities owned or operated by the state is the property of the state.*[1]

The State of Texas owns all the surface water in the State, and it then allows use of that water via a permitting system managed by the Texas Commission on Environmental Quality (TCEQ). Even if developers use groundwater to fill a surface water feature, when the groundwater becomes surface water, it loses its character as groundwater, becoming surface water and thus owned by the State.[2]

These historic stock tanks are exempt from state permitting requirements when:

1. The same person owns all the land on which the stock tank is located;
2. The volume of water normally stored is 200 acre feet or less; and
3. The water in the stock tank is used only for domestic and livestock purposes."[3]

> "Domestic use" means the "use of water by an individual or a household to support domestic activity. Such use may include water for drinking, washing, or culinary purposes; for irrigation of lawns, or of a family garden and/or orchard; for watering of domestic animals; and for water recreation including aquatic and wildlife enjoyment. If the water is diverted, it must be diverted solely through the efforts of the user. Domestic use does not include water used to support activities for which consideration is given or received or for which the product of the activity

[1]Water Code § 11.021(a)

[2]See, e.g., *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012) (Day), where groundwater produced and transported to a small watercourse in the well owner's property to a small reservoir for irrigation lost its status as groundwater and became state water. In my opinion, this result is an oversimplification of a very complicated set of statutes, and there may be ways to obtain the exact opposite result with a more sophisticated approach to how landowners may document the groundwater production and movement with permits and other evidence. These issues are well beyond the scope of this paper.

[3]Water Code § 11.142(a)

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