

**PRESENTED AT**

**20<sup>th</sup> Annual Land Use Conference**

April 28-29, 2016  
Austin, Texas

## **Harris County Flood Control Dist. v. Kerr**

**Panel:**

**Truman C. Edminster**

**Charlie F. McNabb**

**Reid C. Wilson**

Author Contact Information:

Reid C. Wilson

Wilson, Cribbs & Goren, P.C.

Houston, TX

[rwilson@wcglaw.net](mailto:rwilson@wcglaw.net)

713-222-9000

# Harris County Flood Control Dist. v. Kerr

*Harris Cty. Flood Control Dist. v. Kerr*, No. 13–0303, — S.W.3d —, 2015 WL 3641517 (Tex. June 12, 2015), rehearing granted February 19, 2016, has caused a wave of controversy and concern among Texas governments. In the opinion, the Supreme Court either i) simply gave the plaintiffs a day in court for their takings claim to be heard on the merits, or ii) fundamentally expanded takings law and fundamentally limited governmental immunity. Since rehearing was granted, after this paper was commenced, we have the opportunity to wait for further clarification from the Supreme Court. The court has not withdrawn the opinion, and has not set a date for the rehearing.

This paper will review and summarize the opinion (5-4 majority opinion, 4 justice dissent and additional 2 justice dissent). Then it will review and summarize the Motion for Rehearing and the 15 amicus briefs filed relating to that Motion. Finally, it will raise questions and concerns with the legal and practical impact of the opinion, from the development community perspective.

## I. MAJORITY OPINION

JUSTICE DEVINE delivered the majority opinion of the Court, in which CHIEF JUSTICE HECHT, JUSTICE GREEN, JUSTICE GUZMAN, and JUSTICE BOYD joined.

### **Background Facts:**

In 1976, the U.S. Army Corps of Engineers prepared a report on the upper White Oak Bayou in Harris County. The report noted that recurrent damaging floods were attributed primarily to “inadequate channel capacities of the streams.” The report stated that this problem was “compounded by the continuing increases in suburban development which reduces the infiltration of rainfall and increases and accelerates runoff to the streams.” Inadequate street drainage and storm sewers also caused severe localized flooding. The report predicted that: “additional residential development is expected to occur with or without an adequate plan for controlling the floods.” Subsequent delay in federal funding for the Corps' plan led Harris County officials to develop their own flood-control plan.

The government entities commissioned Pate Engineers, a well-respected local engineering firm, to develop a plan. The “Pate Plan,” adopted by the County in 1984, proposed to eliminate flooding along the upper bayou for 100–year flood events. The plan was to be funded through local taxes and impact fees, but it was never fully implemented. A 1989 flood revealed flaws in the Pate Plan's engineering analysis.

The County, through Harris County Flood Control District, a part of the County, commissioned another report on the upper White Oak Bayou watershed from Klotz Engineering, a well-respected local engineering firm, and this plan became known as the “Klotz Plan.” The Klotz Plan was modeled around containing 10–year (as opposed to 100–year) flood events. The government entities adopted these changes in the early 1990’s.

Three significant storms over 1998-2002 (Tropical Storms Francis and Allison, and an unnamed 2002 storm) flooded many homes which previously had not flooded.

The plaintiffs, over 400 landowners and former landowners whose properties were damaged by flooding, sued a broad array of parties (the County, the District, Utility Districts, developers, engineering firms) for a variety of claims. Many settled or were dismissed. The litigation continued for years with interim appeals.

At this stage of the litigation, the plaintiffs asserted inverse condemnation (taking) and nuisance. They asserted that Harris County and Harris County Flood Control District approved new upstream development without implementing appropriate flood-control measures. They further asserted that the government entities approved this new upstream development, while being substantially certain that flooding would result.

### **Procedural Stance of the Case:**

The government entities filed pleas to the jurisdiction asserting immunity and no facts supporting the required elements for a taking. The pleas were denied at the Trial and Court of Appeals level. Appellants petitioned for review. The Supreme Court considered whether or not the homeowners raised a fact question regarding the elements of a governmental taking.

### **Rules for Takings:**

First, the Supreme Court restated the traditional rules for a taking:

- No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person....TEX. CONST. art. I, § 17(a).
- Those seeking recovery for a taking must prove the government “intentionally took or damaged their property for public use, or was substantially certain that would be the result.” *City of Keller v. Wilson*, 168 S.W.3d 802, 808 (Tex.2005).
- Sovereign immunity does not shield the government from liability for compensation under the takings clause. *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex.2001).
- To defeat the government entities' plea to the jurisdiction, the plaintiffs need only raise a fact issue as to each element of their claim. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex.2004).
- The plaintiffs must raise a fact issue as to intent, causation, and public use. *Little-Tex Insulation Co.*, 39 S.W.3d at 598.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Harris County Flood Control Dist. v. Kerr

Also available as part of the eCourse

[Property Rights: Update on Takings and the Complicated Nature of Easements](#)

First appeared as part of the conference materials for the

20<sup>th</sup> Annual Land Use Conference session

*"Harris County Flood Control Dist. v. Kerr"*