

CAUSE NO. _____

THE CITY OF HUNTERS CREEK §
VILLAGE, TEXAS §

Plaintiff

v.

THE CITY OF PINEY POINT VILLAGE, §
TEXAS, by and through, THE CITY §
COUNCIL OF THE CITY OF PINEY §
POINT VILLAGE, TEXAS and PETER G. §
NEMETH IN HIS OFFICIAL CAPACITY §
AS MAYOR OF THE CITY OF PINEY §
POINT VILLAGE, TEXAS §

Defendants.

IN THE COUNTY CIVIL COURT AT LAW

NO. _____ OF

HARRIS COUNTY, TEXAS

**PLAINTIFF'S ORIGINAL PETITION FOR INVERSE CONDEMNATION AND
PERMANENT INJUNCTION**

COMES NOW, the City of Hunters Creek Village, Texas (“Hunters Creek”), Plaintiff in the above-styled and numbered cause, and files this, its Original Petition For Inverse Condemnation and Permanent Injunction complaining of the Defendants, City of Piney Point Village, Texas (“Piney Point”), by and through the City Council of the City of Piney Point Village, Texas (“the Council”), and Mayor Peter G. Nemeth (“the Mayor”), in his official capacity as the Mayor of the City of Piney Point Village, Texas, and for cause of action would respectfully show unto the Court the following:

I. DISCOVERY CONTROL PLAN

1. Plaintiff intends to conduct discovery, if any, under Level 2 of Rule 190, Texas Rules of Civil Procedure.

II. PARTIES; SERVICE OF PROCESS

2. Plaintiff Hunters Creek is a duly organized Type A, general law municipality located within the state of Texas.

3. Defendant Piney Point is a duly organized Type A, general law municipality located within the state of Texas and may be served with process at 7676 Woodway Drive, Suite 300, Houston, Harris County, Texas 77063-1523 by serving its mayor, Peter G. Nemeth or the City Secretary, Amanda Davenport.

4. Defendant Peter G. Nemeth is the duly elected mayor of the City of Piney Point Village, Texas, and may be served, in his official capacity, with process at 7676 Woodway Drive, Suite 300, Houston, Harris County, Texas 77063-1523 or at his place of business at 5 Houston Center, 17th Floor, 1401 McKinney Street, Suite 1700, Houston, Harris County, Texas 77010.

III. JURISDICTION, VENUE, AND STANDING

5. Venue is mandatory in Harris County, Texas because all of the events giving rise to this litigation occurred in Harris County. TEX. CIV. PRAC. & REM. CODE § 15.003(a)(1)-(3). Piney Point is a political subdivision located in Harris County, Texas, and the Mayor of Piney Point resides in Harris County. *Id.*

IV. PROPERTY

6. The right-of-way known as Kemwood Drive is dedicated to Plaintiff and Plaintiff is charged with the maintenance and operation of this public right-of-way. Plaintiff has exclusive control over its streets within its boundaries. TEX. TRANS. CODE § 311.002.

V. WAIVER OF IMMUNITY

7. Immunity does not bar a claim for inverse condemnation brought under Article 1, Section 17 of the Texas Constitution, which prohibits the taking, damaging, destruction or application of a person's property for public use without adequate compensation. *State v. Brownlow*, 319 S.W.3d 649 (Tex. 2010); *Southwestern Bell Tel. v. Harris Cty. Toll Rd. Auth.*, 282 S.W.3d 59, 61 (Tex. 2009); *State v. Holland*, 221 S.W.3d 639, 643 (Tex. 2007); *Golden Harvest Company, Inc., v. City of Dallas*, 942 S.W.2d 682 (Tex. App.—Tyler 1997) (flooding of downstream property due to release of water from city dam allegedly to protect the dam can constitute taking, damaging or destruction of property); Barry Abrams, *Sovereign Immunity & Exceptions-Defendant's Perspective*, in *State Bar of Texas Suing and Defending Governmental Entities § IV (1998)*.

VI. SUMMARY

8. In October 2011 Piney Point installed a brick wall restrictor ("restrictor") on a jointly shared storm sewer which Piney Point knew or reasonably should have known would cause flooding within Hunters Creek and which did cause extensive flooding on January 9, 2012, January 24, 2012, and February 2012 and will continue to cause flooding as long as the restrictor remains in place. Piney Point's backing up of the flood water onto Kemwood Drive in Hunters Creek constitutes inverse condemnation because Piney Point's use of the right-of-way of Hunters Creek to store its flood water is a public use of Hunters Creek's property. Hunters Creek requests that (1) Piney Point be enjoined from interfering with Hunters Creek's drainage system and that (2) a mandatory injunction issue to Piney Point to remove the restrictor located under Kemwood Drive.

VII. FACTUAL BACKGROUND

9. This dispute stems from a flood control improvement project known as the “Soldiers Creek Relief Project” (hereinafter “the Project”). The Project consists of flood control improvements designed to reduce the flooding potential in a substantial portion of the Soldiers Creek watershed. Piney Point approached Hunters Creek to install a storm sewer system from Piney Point under and through Hunters Creek with such storm sewer eventually emptying into Soldiers Creek. All outfalls are located within Hunters Creek. In exchange for allowing Piney Point to traverse Hunters Creek, Hunters Creek obtained storm water drainage capacity, a portion of which is capacity held in reserve to serve Hunters Creek’s future drainage needs. Further, Hunters Creek made storm sewer improvements and built drainage structures which it would not otherwise do to accommodate the Soldiers Creek Bypass.

10. The Project is the subject of an Interlocal Agreement (hereinafter “the Contract”) pursuant to the authority granted by TEX. GOV’T CODE Chapter 791 executed February 12, 2002, between the Harris County Flood Control District (hereinafter “Flood Control District”), and the cities of Piney Point and Hunters Creek. Paragraph XVI, states specifically that “Piney Point shall not undertake, or cause to be undertaken, any alterations or modifications of improvements constructed pursuant to this Agreement without first securing the approval of the Flood Control District of the plans and specifications for the same, and the approval of Hunters Creek, where the Project improvements affected are within the corporate limits of Hunters Creek.”

11. The Project was built by Piney Point to the Final Record Drawings dated November 2004 and completed in 2007. In October 2010 Hunters Creek connected Kemwood Drive to the 36-inch pipe that had been stubbed out by Piney Point within the jurisdiction of

Hunters Creek. Piney Point installed the drainage pipe in question pursuant to the approved, sealed and signed plans.

12. Around January 25, 2011, John Peterson, Piney Point's City Engineer, wrote to Charles Eastland, Hunters Creek's City Engineer, regarding the drainage project on Kemwood Drive, which is a cross street connecting to the Project. In Peterson's email, he stated:

"Piney Point Village City Council has requested the information identified in the above items numbered 1 - 4 be submitted for review and a properly sized restrictor be installed within ten days. If the City of Piney Point does not receive the requested information and the properly sized restrictor is not installed, the City will install its own restrictor inside the City limits to regulate the flow to the original amount identified and approved in the Preliminary Engineering Report. The proposed (and installed) 36" RCP will be restricted to a 4" pipe to limit the additional amount of flow into Soldiers Creek Bypass."

Piney Point's position is inconsistent with the Record Drawings and the actual construction of the pipes. It should be noted that the drainage pipes in question all empty within Hunters Creek and do not empty within Piney Point. Piney Point is not flooded because of this extra flow.

13. In October 2011 Piney Point ordered its city engineer to have constructed a restrictor to plug or reduce the 36-inch drainage pipe on Kemwood Drive. Piney Point installed the restrictor without telling Hunters Creek.

14. On January 9, 2012, the first significant rain event during the recent drought occurred over the Memorial Villages. Approximately 6 inches of rain fell in a very short period of time. There was adequate drainage on the streets constructed with the same methodology as Kemwood. Kemwood flooded. At some points the water was three feet deep on the road and

popped a manhole cover out of its receptacle. Because of the wisdom and foresight of the engineer for Hunters Creek during the dispute with Piney Point over the drainage, a small relief pipe was connected onto the Kemwood drainage system to drain to the Timberglen drainage system. Otherwise homes would have been flooded, automobiles lost, property damaged and possibly life lost.

15. Coincidentally, on the same date as the January 9, 2012, flood, Piney Point's engineer sent an email to Hunters Creek's engineer requesting approval of an unrelated drainage plan. This was an attempt to extort approval of Piney Point's new and unrelated drainage plan.

16. On January 10, 2012, a conference was held between the City engineers of Hunters Creek and Piney Point. When asked directly if a restrictor had been installed affecting only Kemwood Drive, John Peterson of HDR/Claunch & Miller Engineering Consultants, (the engineer for Piney Point) admitted that he had been given an order by the Mayor and City Council of Piney Point to install a restrictor. Although Peterson had previously threatened to place a restrictor restricting the drainage to a 4-inch orifice, Mr. Peterson claimed that they only reduced it to 12 inches. Against best engineering practices which required the installation of a restrictor at a manhole to allow for easy access and for clean out, the installation was done, on information and belief, by having the workers walk up the 6 x 10 ft. box culverts and install it at the joint between the box culvert and the 36-inch pipe. Because of the significance of the flooding an inspection was made and it was determined that the restricted orifice was clogged. After the debris was removed, it was discovered that the 36-inch drainage pipe was reduced to eight inches and so poorly constructed that it catches debris. Piney Point deliberately and secretly sabotaged Hunters Creek's drainage system by the placement of the restrictor. Mr. Peterson of

HDR/Claunch & Miller misled Hunters Creek's engineer as to the time of installation and size of the restrictor.

17. On January 24, 2012, another significant rain event occurred which flooded Kemwood Drive, as well as in February 2012.

VIII. INVERSE CONDEMNATION

18. The actions of Piney Point rise to the level of an inverse condemnation or taking under Article 1, Section 17 of the Texas Constitution. The construction of the restrictor was an intentional act, and Piney Point knew or was substantially certain that the restrictor would cause flooding on Kemwood Drive. Kemwood Drive is dedicated exclusively to Hunters Creek. The construction of the restrictor was the proximate cause of the flooding on Kemwood Drive, including the flooding of the street right-of-way. Evidence of causation includes other projects built to the same specifications performed as they should and did not cause flooding. Hunters Creek did not consent to the installation of the restrictor or the resulting flooding on Kemwood Drive and did not receive any compensation for the ensuing taking of the storage of storm water on Kemwood Drive. This taking was for the public use of Piney Point so that Piney Point could store its water on Kemwood Drive or, as Piney Point has stated, to protect the integrity of the public storm drainage utility.

IX. APPLICATION FOR PERMANENT INJUNCTIVE RELIEF

19. Hunters Creek seeks and is entitled to have Piney Point, and all persons acting in concert with it, enjoined to immediately remove any restrictor or other type of device currently existing in the 36-inch PVC located at Kemwood and Hedwig that in any way limits Hunters Creek's drainage capacity or the amount of storm water drainage flowing into the Soldiers Creek Bypass. Plaintiff Hunters Creek and its residents will suffer and have suffered irreparable injury

because its storm water drainage system will not function properly and will flood the streets and ultimately cause flooding to one or more residents of Hunters Creek. There is no adequate remedy at law; only equity will provide adequate relief. Injunctive relief is available for constitutional violations. *City of Beaumont v. Bouillion*, 896 S.W.2d 143 (Tex. 1995). Barry Abrams, *Direct Causes of Action Under the Texas Constitution, Including Damages*, in *State Bar of Texas Suing and Defending Governmental Entities § V* (1995).

X. PRAYER

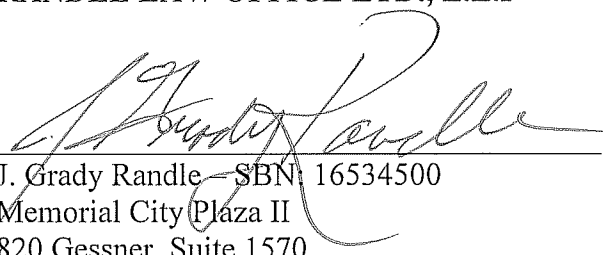
WHEREFORE, PREMISES CONSIDERED, Plaintiff City of Hunters Creek Village requests that Defendants be cited to answer herein and that on final trial of this matter:

- a. Hunters Creek has a permanent injunction on final trial of this cause enjoining Piney Point from interfering with Hunters Creek's drainage system and requiring Piney Point to remove the restrictor.

Respectfully submitted,

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