2017 IL App (2d) 160853-U
No. 2-16-0853
Order filed May 25, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CHICAGO TITLE LAND TRUST CO., as Trustee under Trust No. 8002361712, dated April 26, 2013,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellant,	)	
v.	)	No. 13-MR-313
THE VILLAGE OF ROSELLE,	)	Honorable Paul M. Fullerton,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Jorgensen and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court applied the correct legal standard in bench trial, and its judgment was not against the manifest weight of the evidence. Further, no relief could be granted for its erroneous dismissal of plaintiff's takings claim, as that claim was foreclosed on another basis.

¶ 2 In this appeal, the plaintiff, Chicago Title Land Trust Co., as trustee under a land trust, challenges the judgment in favor of the defendant, the Village of Roselle (Village), reached after a bench trial. The plaintiff claimed that the defendant's actions in installing a relief sewer (Relief Sewer) increased the flooding of the plaintiff's building located at 20 N. Roselle Road in Roselle (Property). The plaintiff also appeals the earlier dismissal of its claim premised on the Takings Clauses of the federal and Illinois constitutions. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The beneficiary of the plaintiff land trust is Michael Emond. In the late 1990s, Emond's father purchased the Property, which is located at the corner of Roselle Road and Hattendorf Avenue. In 2002, Emond's father built a one-story office building and a paved parking lot on the Property. The building had a full basement, part of which was improved with two offices, a file room, two restrooms, and a kitchen and break room area furnished with kitchen appliances, cabinets, seating, and a TV.

¶ 5 The Property is on a triangular block bounded on the east by Roselle Road (a major north-south thoroughfare), on the north by Thorndale Avenue (a small east-west street), and along the south and west by Hattendorf Avenue (a wider street that runs at a diagonal from the northwest to the southeast). One residence is located immediately to the north of the Property. An open area (Post Office Park), takes up the remainder of the block west of the residence and the Property. On this triangular block, and along Hattendorf Avenue (collectively, the Hattendorf area), the ground generally slopes downward from west to east, and from north to south. The eastern boundary of this area, Roselle Road, is situated higher than the surrounding area.

¶ 6 The Property is located in the lowest spot of its block, the southeastern corner. Although the Property does not contain any designated wetlands, nor is it in a designated flood hazard area, it has experienced varying levels of flooding over the years.

¶ 7 When the building was built in 2002, two storm sewer lines served the property. One 10-inch line led from an intake in the yard southeast of the building to a 10-inch line running along Hattendorf Avenue. A second intake in the parking lot drained to the same Hattendorf Avenue

line through a 6-inch pipe. The Hattendorf Avenue line in turn emptied into larger 18- and 24-inch lines near Roselle Road.

¶ 8 In 2006, the Village extended the Hattendorf Avenue sewer line slightly farther to the west of the Property, adding new intakes on the south side of Hattendorf Avenue and in Post Office Park near its boundary with the Property. The extension did not increase the discharge rate (the rate at which water could flow through the pipes) of the Hattendorf Avenue line.

¶ 9 A residential area located two blocks north of the Property (the Glenlake area) regularly experienced storm-related flooding of Glenlake Avenue and the front yards of houses located along it. Like the Hattendorf area, the topography of the Glenlake area is higher to the west and north. Prior to 2008, the Glenlake area was drained solely by a 12-inch storm sewer line that ran east under Glenlake Avenue to Roselle Road, where it emptied into the storm sewer that ran south along Roselle Road.

¶ 10 In late spring 2008, the Village built the Relief Sewer. The intake for the Relief Sewer was in a pre-existing catchbasin located at one of the low areas along the Glenlake Avenue storm sewer line. The Relief Sewer, a 12-inch pipe, ran directly south for two blocks to Hattendorf Avenue. There, it turned to the southeast and emptied into the western terminus of the Hattendorf Avenue line (a 10-inch line).

¶ 11 In February 2013, the predecessor trustee for the Property filed a four-count complaint against the Village, seeking declaratory and injunctive relief. Count I sought a declaratory judgment that the construction and operation of the Relief Sewer violated the Illinois Drainage Code (70 ILCS 605/2-1 *et seq*. (West 2012)) and the DuPage County Countywide Stormwater and Flood Plain Ordinance (adopted by the County Board of DuPage County on September 24, 1991, as Appendix F to the DuPage County Stormwater Management Plan, Ordinance No. OSM-

0001-89). Counts II and III sought findings that the Relief Sewer had created a nuisance and a trespass (in the form of an unnatural accumulation of water) on the plaintiff's property. Count IV sought to preliminarily and permanently enjoin the operation of the Relief Sewer. Six months later, the plaintiff filed an amended complaint that substituted Chicago Title Land Trust (the new trustee) as plaintiff, and added a new count V that alleged, as an alternative if injunctive relief were not granted, an uncompensated taking of the Property under both the Illinois constitution and the United States Constitution. In response to a previous dismissal without prejudice, the amended complaint also changed the wording of counts I through IV. The trial court eventually dismissed count I for failure to state a claim.

¶ 12 On January 16, 2014, the plaintiff filed its second amended complaint, which contained the same five counts. (Count I was repled solely to preserve it in case of an appeal.) The Village moved to dismiss count V, filing a combined motion pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 2-619.1 (West 2012)). It argued that count V failed to state a claim because the plaintiff had not alleged the existence of all of the factors that were germane to the issue of whether a taking had occurred. See *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, __, 133 S. Ct. 511, 522 (2012). Further, it argued that, although in *Arkansas Game* the United States Supreme Court had recently recognized that the temporary flooding of property could constitute a taking, Illinois case law was still to the contrary, and so the takings claim could be brought only under the federal constitution and not the Illinois constitution. Finally, the Village argued that the takings claim could not, as a matter of law, be sustained because the plaintiff's expert had stated in his report (which was attached to the second amended complaint) the opinion that "the construction of the diversionary Storm Relief Sewer was an unintentional error and *** resulted in regular flooding of a building that the sewer was not

intended to flood." The Village argued that this opinion contradicted the complaint's allegation that the Village "intentionally directed stormwater toward the Property." Further, the expert's statement meant that the plaintiff could not show that a taking under the federal constitution had occurred, because one of the factors to be considered in assessing whether the temporary flooding of property constituted a taking was "the degree to which the invasion [of water] is intended or is the foreseeable result of authorized government action." *Id.*, 568 U.S. at __, 133 S. Ct. at 522.

¶ 13 The plaintiff responded that it had adequately alleged the factors relevant to a takings claim, including that the flooding of the Property caused by the Relief Sewer was foreseeable. It also argued that, under *Arkansas Game*, the issue of whether a taking has occurred is a factual one that cannot be decided through a motion to dismiss. *Id.* at 518. As for the viability of the takings claim under the Illinois constitution, the plaintiff noted that the Illinois takings clause was generally interpreted in lockstep with the similar provision of the federal constitution, and thus the earlier Illinois case law that was contrary to the holding of *Arkansas Game* should be considered to have been overruled. Finally, the plaintiff argued that it need not show that the Village set out to deliberately flood the Property when it constructed the Relief Sewer; rather, under *Arkansas Game*, it need only plead and prove that the Village could have foreseen that, in constructing the Relief Sewer, the water removed from the Glenlake area would likely lead to increased flooding at the Property.

¶ 14 On August 20, 2014, the trial court granted the motion to dismiss. It held that the takings claim under the federal constitution was adequately pled, and that the takings claim under the Illinois constitution was viable based upon the limited lockstep approach. However, the trial court agreed with the Village that the plaintiff's expert's opinion (that the Village did not intend

to flood the Property when it built the Relief Sewer) directly contradicted the allegations of the complaint, and as a result the takings claim could not stand.

¶ 15 The three-day bench trial on the remaining counts (nuisance, trespass, and for injunctive relief) commenced on June 13, 2016. Emond was the first witness for the plaintiff. He testified regarding the purchase of the Property and the construction of the building on it. He operated a mortgage brokerage business arranging residential loans for customers. He used part of the basement (the area with the kitchen, TV, seating, and a table) as an informal place to entertain and conduct business that was especially helpful for customers with children, who could watch TV or play video games while their parents executed loan documents. The remainder of the basement served as additional office and file storage space.

¶ 16 Emond described the flooding at the Property over the years. During the six years between 2002, when the building was built, and April 2008, when the Relief Sewer was constructed, water entered the building on five or fewer occasions. Emond characterized the water as "seepage" that got the basement carpet wet. The water entered through a window well near the northeast corner of the building, and only the carpet in that area got wet. On three of these occasions, Emond had the water professionally removed and the carpet dried. None of the drywall or furnishings in the basement were damaged by water during this period, and Emond did not have to have the carpet replaced.

¶ 17 After a storm on September 22, 2006, caused water to enter the basement, Emond contacted the Village. He had seen water backing up from the storm drain on Hattendorf Avenue, flowing around his building, and then entering the basement through the window well. Village officials told him verbally that they were looking into it. He also received a letter from the Village saying much the same thing and explaining that drainage and storm sewer

improvement in the area was complicated by large ducts for telephone cables that ran along the west side of Roselle Road.

¶ 18 Emond testified that, in the five years after the Relief Sewer was installed, the building on the Property flooded ten times: September 13, 2008; September 24, 2008; June 19, 2009; July 24, 2010; May 29, 2011; June 9, 2011; July 23, 2011; August 20, 2011; July 18, 2012; and April 17-18, 2013. The parties agree that the storms on four of these dates (September 13, 2008; July 24, 2010; June 9, 2011; and April 17-18, 2013), were of a "100-year" intensity, that is, climatologists estimated that there was only a one percent chance that such an intense storm would occur in any given year. The June 19, 2009, storm was of a "10-year" intensity. The remaining five storms were more ordinary rainfall events. Only one high-intensity storm had occurred during the six-year period before the Relief Sewer was installed.

¶ 19 During several of the high-intensity storms, Emond personally observed storm water backing up and flowing out of the Relief Sewer through an inlet in Post Office Park. (This backflow was referred to by the expert witnesses as "surcharging.") Emond observed the backflow flooding Post Office Park and then flowing toward the Property, circling the north side of the building, and entering the basement through the window wells. A video taken by Emond during the April 2013 "100-year" storm showed rain water draining normally on Hattendorf Avenue and through the inlet in the parking lot of the building (which did not drain into the Relief Sewer), while at the same time water was flowing out of the Post Office Park inlet for the Relief Sewer. Emond testified that he took pictures showing the Post Office Park inlet also surcharging during at least one ordinary-intensity rainfall (on May 29, 2011). Portions of the video and several pictures of flooding were admitted into evidence.

¶ 20 The Property experienced severe flooding during the high-intensity storms. For instance, the 11- to 12-foot deep basement was completely filled with water and the water was six inches deep on the first floor during the September 13, 2008, storm. All of the furnishings, appliances, fixtures, walls, and ceilings in the basement were destroyed during that storm. The later "100-year" storms again filled most of the basement with water, often pushing the windows in the basement window wells out of their frames from the force of the water. Emond never installed new construction or improvements in the basement of the Property.

¶ 21 Emond testified that, after the Relief Sewer was installed, even ordinary storms flooded the basement of the Property with a "substantial amount of standing water." As for the September 24, 2008, storm, the amount of standing water was less than one foot deep. Emond did not recall details regarding the flooding caused by the other ordinary storms. Emond testified that, as a result of the flooding, he could not sell or lease the building to others.

¶ 22 Michael Higgins testified that he was a licensed engineer who served as the Village Engineer until his retirement in 2011. He was responsible for the design of the Relief Sewer. He did not employ outside consultants in designing it, nor did he conduct any formal design process. Rather, he visited the location, determined what size pipe could be installed, and considered the effect of installing the Relief Sewer in an informal way. He did not obtain any permit for the Relief Sewer because, as the Village Engineer, he was able to sign off on any such permit. He testified that, when the Village installed the Relief Sewer, it also removed certain old connections from Hattendorf Avenue inlets into the Hattendorf Avenue storm sewer line, leaving the two inlets on the Property to drain to their own "dedicated" sewer line that emptied into the 24" Roselle Road line. He viewed this as providing a benefit to the Property.

¶ 23 Robert Burns, the former director of the public works department for the Village, testified that his department was responsible for the drainage of storm water in the Village, and the Village Engineer had reported to him. He was familiar with the topography of the area near the Property. He agreed that, given the large ducts for telephone lines running along the west side of Roselle Road, there was "a restriction point at Hattendorf and Roselle Road" limiting the amount of storm water that could flow east of Roselle Road to the larger storm sewers there. Burns also confirmed that, prior to the installation of the Relief Sewer, storms often caused flooding along Glenlake Avenue. Since the installation of the Relief Sewer, the Glenlake area drained faster. Prior to trial, Burns had not realized that the intake for the Relief Sewer was lower than the Glenlake Avenue storm sewer line to which it connected.

¶ 24 The remaining two witnesses were the expert witnesses for each party. The plaintiff's expert, Robert Hamilton, was a founder of the civil engineering firm Gewalt Hamilton and had performed many drainage projects for municipalities or other public entities. Hamilton himself had served as a Village Engineer for 40 years in Northbrook, Kildeer, and Barrington Hills.

¶ 25 Hamilton testified that storm sewers are designed to provide drainage only for low- and moderate-intensity rainfall up to the level of "10-year" storms. In higher-intensity rainfall events, storm sewers become full and stormwater travels overland. Civil engineers use streets, swales, and similar mechanisms to channel this overland water flow. Hamilton was critical of the Village's officials for not having created any construction or engineering plans for the Relief Sewer.

¶ 26 Hamilton described the Glenlake area and the Hattendorf area as two separate watersheds. These watersheds would connect in a "major storm," as the capacity of the Glenlake basin (approximately 500,000 gallons) would be reached and stormwater from the Glenlake area

would then begin overflowing into the Hattendorf basin. However, in smaller storms, these two watersheds would remain distinct. The topographical information he used as his basis for this analysis was the county's topographical map.

¶ 27 Prior to the installation of the Relief Sewer, stormwater from the Glenlake area had been sent east through the Glenlake line to the Roselle Road line, while the Hattendorf area drained separately. The initial inlet for the Relief Sewer was in a catchbasin located about halfway along the existing Glenlake line. However, the Relief Sewer was built 8 inches lower than the Glenlake line, causing the water entering the Glenlake line above that point to divert and flow south down the Relief Sewer instead. Because of this, the Relief Sewer was not really a "relief sewer" in the usual meaning of that term: relief sewers are usually intended as secondary channels to receive water once it rises above a certain level, but the Relief Sewer installed by the Village instead served as the primary drainage route for water in much of the Glenlake area because its intake was lower than much of the rest of the Glenlake line. Further, because the capacity of the Hattendorf line (into which the Relief Sewer emptied) was not increased, the Relief Sewer simply transferred water from the Glenlake watershed to the Hattendorf watershed. Hamilton calculated that the Relief Sewer drained about 6 of the 10.3 acres of the Glenlake watershed, increasing the water transported to the Hattendorf watershed by 73 percent. Further, this diversion effect was greatest during smaller storms, during which the watersheds would have remained separate if not for the Relief Sewer.

¶ 28 Hamilton opined that the Relief Sewer transported water across the "drainage divide" between these two areas, bringing to the Hattendorf area additional water beyond that caused by the natural conditions and thereby violating the Illinois drainage code. In addition, the increased rate of flow through the Relief Sewer caused more frequent surcharging, which itself was a

change from the preexisting natural flow of water over the land. The increase in surcharging also violated the Illinois drainage code. Hamilton concluded that the installation of the Relief Sewer had caused increased flooding on the Property.

¶ 29 On cross-examination, Hamilton confirmed that he first developed his opinions in this case in 2013; however, he did not receive the as-built diagrams of the Relief Sewer or conduct his field examination of the Relief Sewer until 2015. He did not calculate the capacity of the 24-inch sewer along Roselle Road, because he did not need to: the surcharging through the inlet at Post Office Park provided observable evidence that the capacity of the downstream pipes had been exceeded. Hamilton agreed that the building on the Property had been "built in a flood-prone manner" with the top of the foundation below the grade of Roselle Road. However, Illinois drainage law does not consider whether an existing building is flood-prone. Rather, the drainage law looks only at whether the rate and volume of water have increased unreasonably, and whether water has been diverted from one watershed to another.

¶ 30 Hamilton also revised the testimony he had given earlier to show an even greater effect caused by the Relief Sewer. A closer look at the as-built diagrams had shown that the catchbasin where the Relief Sewer tied into the Glenlake line was in a slight depression along Glenlake, and the catchbasin inlet further east on Glenlake (closer to Roselle) was actually 11 inches higher than the inlet for the Relief Sewer, not just 8 inches. As a result, the water level in the Glenlake catchbasin would have to rise 11 inches higher than the Relief Sewer inlet before any water would flow east toward Roselle Road instead of south through the Relief Sewer. This meant that the volume of water flowing toward the Property had increased not just by 73 percent, as he had testified earlier, but by 100 percent (*i.e.*, it had doubled). Further, before the Relief Sewer was

installed, the water that overtopped the Glenlake basin would meander south overland. Now such water came through the Relief Sewer with a more concentrated flow.

¶ 31 The defendant's expert witness, Christopher Burke, was also the head of his own civil engineering firm. His specialty was stormwater drainage, and he wrote the manual on drainage used by the state of Indiana. Burke had worked extensively in Du Page County.

¶ 32 Burke opined that the Relief Sewer did not worsen the pre-2008 "natural condition" of water coming onto the Property, and it did not increase the area of land that drained to the Hattendorf area. Rather, the increased flooding of the Property was due to its location at the low point of the surrounding area, and the greater number of high-intensity storms that had occurred since the installation of the Relief Sewer.

¶ 33 Burke's opinions were based on computerized models he had prepared, the software for which was developed and maintained by the Environmental Protection Agency. The software was capable of modeling the flow of water over land and through underground pipes, accounting for actual differences in topography, elevation, permeability of the surface, slope, capacity, and the way in which water would react at a drainage divide or at the intersection of sewer pipes. Burke criticized the method Hamilton used to calculate the direction and flow of water as being "100 years old." He further testified that the Glenlake area was not really a distinct watershed; rather, it was a "depressional storage area" with a sub-basin. As for the larger area that included both the Glenlake area and the Hattendorf area, the Property was at the topographical low point and all rainwater that fell on the higher land uphill would naturally flow toward it.

¶ 34 As a basis for his models, Burke used a topographical map of the Glenlake and Hattendorf areas prepared using LIDAR (a range-sensing method similar to radar, but using laser in place of radio waves). He also input the data from the as-built diagrams of the Relief Sewer,

showing the inlet elevations and dimensions of that pipe as well as all of the drainage pipes, catchbasins, and other parts of the storm sewer system in the surrounding area. All of this information was supplemented with the results of surveying conducted by his firm. Burke then input climatological data as well: the amount of hourly rainfall recorded over time on particular dates. He input data for 35 dates on which rainfall events occurred, including the 10 dates on which the plaintiff experienced flooding after the Relief Sewer was built; other rainfall events between 2002 and the installation of the Relief Sewer; and data from "synthetic storms" that were required for design analysis, including ordinary ("five-year" or lesser-intensity) storms.

¶ 35 Burke then modeled the way in which water traveled and the elevation of water at certain locations, for two different conditions: with the Relief Sewer, and without it. For all of the dates he examined, he found either the same or a lower elevation of water on the Property with the Relief Sewer than without it. In other words, the models all showed that the Property would have received even more water if the Relief Sewer had not been installed. The defendant introduced reports of the modeling Burke conducted, showing that, in the parking lot on the Property and on the lawn east of the building on the Property (*i.e.*, between the building and Roselle Road), the elevation of water with the Relief Sewer was either the same or lower than the elevation of water would be without the Relief Sewer.

¶ 36 Burke noted that the Relief Sewer bypassed the Property, traveling from the Glenlake line directly to the Hattendorf line. He testified that, in this way, the Relief Sewer took "water that used to go overland and put it inside the storm sewer." The "100-year" storms in 2008, 2010, 2011, and 2013 were all very large rainfall events that had a catastrophic effect throughout the Chicago area, flooding interstate highways and affecting mass transit as well as basements throughout the region. The intensity of these storms was why the Property flooded so badly on

those dates. Burke reiterated that the flooding would have been even worse without the Relief Sewer. He opined that in no instance did the Relief Sewer cause or worsen the flooding on the Property.

¶ 37 Asked about the surcharging from the Post Office Park inlet that was shown on the video from April 2013 (a "100-year" storm), Burke stated that such surcharging would be expected in such an event when the downstream storm sewers reached full capacity. However, that surcharging did not result in any additional water coming to the Property, because that same water (or even more) would have come overland to the Property without the Relief Sewer. Burke pointed out the ways in which the models accounted for the slight topographical depressions at the inlet in Post Office Park and elsewhere, and testified that the model accounted for surcharging that might occur.

¶ 38 On cross-examination, the plaintiff's counsel asked whether it was good practice for the Village to have failed to engage in the type of planning for the Relief Sewer that was generally necessary for the permit process. Burke largely evaded the question. As for the fact that the inlet for the Relief Sewer in the Glenlake catchbasin was about 11 inches lower than the Glenlake sewer line, Burke stated that his models and simulations took this into account. As for the surcharging Emond observed, Burke could not comment on Emond's testimony that the Post Office Park inlet surcharged even during ordinary-intensity rainfall events. According to his models, the Property actually received the biggest benefit from the Relief Sewer during lower-intensity storms.

¶ 39 The trial court then questioned Burke briefly, asking whether the Relief Sewer increased either the volume or the speed of the water reaching the Property. Burke stated that it did not increase the volume of water on the Property. As for the speed or rate of the flow of water to the

Property, it would change the rate, because in some cases the rate of the water's arrival might decrease by being brought through a pipe that bypassed the Property rather than arriving overland. After the last testimony from the witnesses, both parties submitted written closing arguments.

¶ 40 On September 15, 2016, the trial court issued a nine-page memorandum opinion and order, summarizing the evidence and finding for the Village on all counts. The trial court began by framing the issue as whether the plaintiff had proved by a preponderance of the evidence that the installation of the Relief Sewer unreasonably increased the water flow to the Property, causing flooding and harm to the plaintiff. The trial court noted that the case presented a classic battle of the experts, who presented contrasting explanations for the flooding at the Property that occurred after the Relief Sewer was installed. The trial court characterized both experts as having "impeccable credentials" and it did not make adverse credibility findings with respect to any of the witnesses. Ultimately, however, the trial court accepted the Village's argument that the Relief Sewer did not cause or worsen the flooding at the Property, finding that "Mr. Burke's analysis considered and accounted for many more factors and conditions concerning rainfall events and resulting water flow than did Mr. Hamilton in his analysis and conclusion." Thus, although both experts presented "compelling" testimony, the plaintiff had not carried its burden of proof.

¶ 41 II. ANALYSIS

¶ 42 The plaintiff appeals, raising three arguments: (1) that the trial court applied the wrong legal standard in evaluating the evidence; (2) even if the trial court applied the correct standard, its finding in favor of the Village was against the manifest weight of the evidence; and (3) count V, the takings claim, should not have been dismissed. We take each argument in order.

¶ 43 A. The Applicable Legal Standard

¶ 44 Under longstanding Illinois common law of drainage, although gravity creates a "natural easement" that allows water to flow naturally from a dominant (higher) property to a servient (lower) property (*Bollweg v. Richard Marker Assoc., Inc.*, 353 Ill. App. 3d 560, 573 (2004)), the servient property "is not obligated to receive surface water in different quantities or at different times than would come" naturally to the property (*id*. at 574). Over time, this rule has been modified to recognize the necessity of permitting some development of the higher property. Although this modification began as a "good husbandry" exception applicable in agricultural settings, it has been extended to urban settings as well. See *Shulte v. Flowers*, 2013 IL App (4th) 120132, ¶ 28 (citing *Templeton v. Huss*, 57 Ill. 2d 134, 141 (1974)). Thus, the modern legal standard applied in drainage cases is a reasonableness standard that balances the benefit to the dominant property against the harm to the servient property:

> "In other words, to what extent does the change in the natural flow of surface water benefit the higher land and harm the lower land, and is this balance of harm and benefit equitable? In addressing those questions, the trier of fact may consider the following factors ***: (1) the extent of the harm, (2) the character of the harm, (3) the social value that the law attaches to the use or enjoyment invaded, (4) the suitability of that use or enjoyment to the character of the locality, (5) the burden on the servient estate of avoiding the harm, and (6) the usefulness of the development of the dominant estate." *Id.* ¶ 29.

¶ 45 The plaintiff argues that this balancing test does not apply, because the "good husbandry" exception (even in its modern application to urban and suburban settings) allows only that increase or alteration in water flow that arises from the reasonable development of the dominant

property. Here, the plaintiff argues, there was no "development" of the Glenlake area by the Village. Rather, the Village simply built the Relief Sewer in an effort to ease the flooding in that area. Thus, the plaintiff contends that no balancing test can be applied: any diversion of water from the Glenlake area to the Property is enjoinable as a *de facto* nuisance and trespass. In assessing this legal issue raised by the plaintiff regarding the proper standard by which the evidence should be weighed, our analysis is *de novo*. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006).

¶ 46 The plaintiff's argument rests on the erroneous idea that the "development" of an area can only mean the improvement of that area through the construction of buildings or the like. However, as used in the case law of drainage, "development" means "appropriate use." See, *e.g.*, *Templeton*, 57 Ill. 2d at 141 (it was "policy of reasonableness of use which led initially to the good-husbandry exception"). Further, where the defendant in a drainage case is a municipality, it has obligations to promote the health, welfare, and safety of the entire public it serves, and the actions it takes to fulfill those obligations qualify as actions to "use" or "develop" the territory it encompasses. *Smith v. City of Woodstock*, 17 Ill. App. 3d 948, 955 (1974). Accordingly, courts have regularly applied the balancing test to suits arising from municipal actions that are alleged to have increased the water flow on certain parcels. See, *e.g.*, *Dovin v. Winfield Township*, 164 Ill. App. 3d 326, 336 (1987) (applying the balancing test where city's street improvement was alleged to have caused a nuisance and trespass through increased flow of water onto the plaintiff's property); *Smith*, 17 Ill. App. 3d at 955 (applying the balancing test where the defendant city's operation of a disposal plant and proposed construction of a storm drain were alleged to unreasonably alter the flow of water on the plaintiffs' land). We therefore reject the plaintiff's narrow interpretation of the term "development" and its corresponding

argument that the "good husbandry" exception does not apply here. The trial court correctly applied the balancing test outlined above.

¶ 47 B. Whether the Judgment Was Against the Manifest Weight of the Evidence

¶ 48 The plaintiff next argues that, even if the balancing test was the proper standard to be applied, the trial court's judgment in the case was incorrect. That judgment was based on the trial court's finding that the installation of the Relief Sewer did not cause or contribute to increased flooding on the Property.

¶ 49 "Generally, the standard of review in a bench trial is whether the judgment is against the manifest weight of the evidence. [Citation.] A judgment is against the manifest weight of the evidence only when the opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on the evidence." *Green v. Papa*, 2014 IL App (5th) 130029, ¶ 32. Further, where there is conflicting testimony about the cause of the plaintiff's injury, causation is a question of fact to be resolved by the trier of fact. *Glass v. City of Chicago*, 323 Ill. App. 3d 158, 165 (2001). As such, the trial court's factual finding regarding causation is subject to the same deferential standard as its overall judgment, and we will not reverse unless that finding is contrary to the manifest weight of the evidence. *Samour, Inc. v. Board of Election Commissioners of the City of Chicago*, 224 Ill. 2d 530, 544 (2007).

¶ 50 The plaintiff begins by arguing that the trial court found that the diversion of water onto the Property through the Relief Sewer was reasonable, and this finding was error. In making this argument, the plaintiff contends that the trial court improperly weighed the factors used in the balancing test (see *Shulte*, 2013 IL App (4th) 120132, ¶ 29), and that the evidence showed that the Village failed to exercise proper skill and care in designing the Relief Sewer. These contentions show that the plaintiff misunderstood the basis for the trial court's judgment.

¶ 51 In its memorandum opinion and order, the trial court did recite the balancing test to be applied in drainage cases, including the factors analyzed by the plaintiff in its arguments. Ultimately, however, the trial court's judgment did not rest on any consideration of these factors, but rather on the conclusion that the plaintiff had not proven that the installation of the Relief Sewer caused or contributed to the increased flooding on the Property. Because the plaintiff had not proven this causal link, the trial court did not need to go through the balancing factors—the plaintiff had not shown that the Village caused the diversion of any additional water onto the plaintiff's land, and thus the issue did not arise of whether such a diversion, if proven, would have been reasonable. See *id*. ¶ 33 (where there was evidence that factors other than the defendant's actions could have caused the flooding of the plaintiff's land, judgment in favor of the defendant was not against the manifest weight of the evidence). Similarly, regardless of whether the Village was negligent in designing the Relief Sewer, the Village could not be forced to provide any remedy to the plaintiff where the plaintiff failed to prove that its alleged negligence actually caused the plaintiff any harm.

¶ 52 Nor has the plaintiff shown that the trial court's finding of no causation was erroneous. Findings are against the manifest weight of the evidence "only when the opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on the evidence." *Green*, 2014 IL App (5th) 130029, ¶ 32. Here, ample evidence—Burke's expert testimony and the exhibits documenting his computerized modeling results—supported the trial court's determination that the Relief Sewer did not cause or contribute to increased flooding on the Property. The plaintiff argues that it was "undisputed" that the Property experienced increased flooding after the Relief Sewer was installed, and that the surcharging of water from the inlet in Post Office Park was the source of the water that caused that flooding. However, Burke's

models indicated that the surcharging from the Relief Sewer did not result in any additional water coming to the property than would otherwise have come overland without the Relief Sewer. Although the plaintiff clearly finds its own expert's testimony more persuasive, the trial court was not obliged to agree with that assessment. Rather, conflicting testimony about causation presents a question of fact to be resolved by the trier of fact. *Glass*, 323 Ill. App. 3d at 165. The plaintiff has not shown that the trial court's finding was contrary to the evidence. Accordingly, we find no reversible error.

¶ 53 Further, as the trial court determined that the Relief Sewer did not cause a continuing nuisance or a continuing trespass on the Property, it also acted properly in declining to grant the injunctive relief requested by the plaintiff. The plaintiff argues that, under *Elsner v. Village of Gross Point*, 230 Ill. 230, 241 (1906), "no one has the right to collect water in an artificial channel and cast it upon the land of another in undue and unnatural quantities, contrary to its natural course, and if he attempts to do so a court of equity will interpose to prevent the act." However, it is not the mere diversion of water from its natural course that gives rise to a right to equitable relief: the diversion must cause or threaten the plaintiff some harm. See *id*. (equitable relief is available "when a wrongful act is threatened which *** will injuriously affect the property rights of a citizen"). For instance, in *Smith*, 17 Ill. App. 3d at 952, the reviewing court reversed the trial court's entry of an injunction, holding that, even where a storm drain indisputably altered the natural flow of water, it could not be enjoined absent some proof of an actual injury to the plaintiff.

> " 'To entitle one to injunctive relief he must establish, as against the defendant, an actual and substantial injury and not merely a technical inconsequential wrong entitling him to nominal damages, only. To warrant the allowance of the writ of injunction it must

clearly appear that some act has been done or is threatened against the plaintiff which will produce an irreparable injury to him.' " *Id*. (quoting *Haack v. Lindsay Chemical Co*., 393 Ill. 367, 375 (1946)).

¶ 54 Without proof that the Relief Sewer caused the plaintiff some injury, there was no legal basis for the entry of an injunction. Here, the trial court found that the plaintiff failed to prove that the Relief Sewer resulted in the accumulation of any additional water on the Property. Without causation, there was no legal basis for the entry of an injunction. We therefore affirm the trial court's judgment in favor of the defendant as to counts II, III, and IV.

¶ 55 C. The Takings Claim

¶ 56 The plaintiff's last argument on appeal is that the trial court erred in dismissing count V, its claim that, through the installation and operation of the Relief Sewer, the Village had caused flooding that had damaged the Property, resulting in a taking that should be compensated under the Takings Clauses of the federal and Illinois constitutions. See U.S. Const., amend. V; Ill. Const. 1970, art. I, § 15. It is undisputed (on appeal, at least) that temporary flooding of land caused by governmental action can amount to a compensable taking under those constitutional provisions. See, *e.g.*, *Arkansas Game*, 568 U.S. at ___, 133 S. Ct. at 519; *Hampton v. Metropolitan Water Reclamation District of Greater Chicago*, 2016 IL 119861, ¶ 22 (following *Arkansas Game* as to takings caused by temporary flooding; *Hampton* decision was issued after trial court dismissed the plaintiff's takings claim in this case but before this appeal was filed).

¶ 57 The trial court dismissed this claim on the ground that Hamilton's statement that the Village had not intended to cause the flooding of the Property was an admission that foreclosed any liability by the Village. The plaintiff argues that the dismissal was improper, because a takings claim may be sustained even where the flooding was unintentional, so long as it was

reasonably foreseeable. See *Arkansas Game*, 568 U.S. at ___, 133 S. Ct. at 522 (flooding may create a compensable taking if it is either intended or "the foreseeable result of authorized government action"); *Hampton*, 2016 IL 119861, ¶ 25 (same).

¶ 58 We agree that the trial court misapplied the law and should not have dismissed count V. Under *Arkansas Game*, even if the Village did not intend to flood the Property when it built the Relief Sewer, a takings claim could lie if the flooding was "the foreseeable result" of that action. Thus, Hamilton's concession regarding the Village's intent did not dispose of the claim.

¶ 59 Nevertheless, we find that the plaintiff's takings claim is foreclosed for a different reason. To recover for a taking, a plaintiff must show that the government's actions caused damage to his or her property. See *Arkansas Game*, 568 U.S. at ___, 133 S. Ct. at 520 (distinguishing its prior decision in *Sanguinetti v. United States*, 264 U.S. 146 (1924), on the ground that there was no taking in *Sanguinetti* because "the landowner failed to show a causal connection between the canal and the increased flooding, which may well have been occasioned by changes in weather patterns"); *Sorrells v. City of Macomb*, 2015 IL App (3d) 140763, ¶ 32 (takings claim properly dismissed where the plaintiffs failed to allege that the harm to their land from flooding was caused by the City's actions rather than the actions of a private entity); see also *St. Bernard Parish Government v. United States*, 121 Fed. Cl. 687, 719 (2015) (listing the elements required to prove a takings claim, including causation). In this case, the trial court found that the plaintiff had failed to prove that the Village's actions in installing the Relief Sewer had caused any flooding on the plaintiff's land. This finding of no causation means that the plaintiff cannot sustain a takings claim. Accordingly, we decline to reverse the trial court's dismissal of count V.

¶ 60 III. CONCLUSION

¶ 61 For the reasons stated, the judgment of the circuit court of Du Page County is affirmed.

¶ 62 Affirmed.