CITY OF DALLAS v. HEATHER STEWART: NUISANCE OR NUANCE

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CITY OF DALLAS V. HEATHER STEWART: NUISANCE OR NUANCE

I. INTRODUCTION TO PUBLIC ABATEMENT AFTER CITY OF DALLAS V. STEWART

Today, the Texas Supreme Court holds that "substantial evidence review of a nuisance determination resulting in a home's demolition does not sufficiently protect a person's rights under Article I, Section 17 of the Texas Constitution." Thus, the Texas Supreme Court concludes that a party whose real property was administratively determined a nuisance by an administrative board is entitled to de novo judicial review of the underlying nuisance determination when the party alleges a taking. City of Dallas v. Stewart, 361 S.W. 3d 562, 590 (Tex. 2012) ("Stewart II").

By the decision in Stewart II, the Texas Supreme Court effectively overturns the statutory system created by the Texas Legislature to facilitate nuisance abatement. This is especially troubling because the legislature appears to have made reasonable effort to draft statutes in accordance with the relevant standards pronounced by Texas Courts. The statutes provide for: (1) notice and hearing; (2) a chance to remedy the nuisance; (3) notice to mortgagees and lien holders; (4) a right to judicial appeal; and, (5) a clear definition of what constitutes a nuisance. Id. at 594.

In sum, the Texas Legislature has both: (1) validly defined the nuisance in question and authorized its abatement, Tex. Loc. Gov't Code § 214.001; and, (2) specified what standard of review applies. Tex. Loc. Gov't Code § 214.0012 (f) (Vernon 2012). As a result, the urban nuisance statutes arguably comport with case law precedent on nuisance abatement. And arguably, Heather Stewart was afforded due process and her takings lawsuit should have been precluded. Stewart II, 361 S.W.3d at 595.

The Texas Supreme Court reviewed the Stewart decision on two separate occasions. In both instances, the Court affirmed the lower court's decision. The Texas Supreme Court held that "substantial evidence review of a nuisance determination resulting in a home's demolition does not sufficiently protect a person's rights under Article I, Section 1 of the Texas Constitution." The Court holds that an administrative board's nuisance determination was not preclusive in the home's abatement. Id. at 566.

Today the Texas Supreme Court holds that a system permitting an unelected, administrative board, whose decisions are essentially conclusive, to decide constitutional issues of this importance (i.e., public nuisance abatement) does not correctly balance the need to abate nuisances against the rights accorded to property owners under our constitution. In the context of a property owner's appeal of an administrative nuisance determination, independent de novo District Court review is a constitutional necessity. Id. at 564.

Because the Texas Supreme Court believes that unelected municipal agencies cannot be effective bulwarks against constitutional violations, the Court holds that the administrative board's nuisance determination, and the Trial Court's affirmation of that determination under a substantial evidence standard, are not entitled to preclusive effect in Heather Stewart's takings case, and the Trial Court correctly considered the issue de novo. Id. at 581-82.

After Stewart I and Stewart II, governmental entities are concerned that administrative nuisance abatement, and public nuisance abatement in general, requires prolonged and expensive judicial intervention. Stewart II demands judicial review of a timely appeal and takings claim from an administrative board's nuisance determination. Further, the Texas District Court is not bound by a substantial evidence review on the appeal. The Texas Supreme Court asserts that Stewart II's holding is limited to "review of agency decisions of substantive constitutional rights," and thus "does no violence to the general rule that Trial Court decisions on mixed questions of fact and law are reviewed for abuse of discretion" Id. at 578, 596-97.

There are grave concerns that Stewart II circumvents the prior administrative nuisance jurisprudence in favor of a judicial takings inquiry. The Texas Supreme Court's decision arguably opens the door to a host of takings challenges to agency determinations of every sort, and in every such challenge, a right to judicial review de novo should be claimed. Judges at every level of our court system are now invited by the decision to substitute their own factual determinations for that of an agency or even a lower court. It is not surprising that the Texas Attorney General and numerous cities rallied in support of the administrative process and enabling statutes by appearing as Amici. Id. at 579, 595, 597-98.

This paper seeks to reconcile Stewart II to the needs of governmental entities. The citizens of Texas require protection from dilapidated, substandard, unfit for human habitation buildings that are hazardous to the public health, safety and welfare. The Government must address these obligations while obeying the Texas Supreme Court's precedent. This paper will discuss how Stewart II affects the administrative abatement process under the Texas Local Government Code. The paper will offer practice tips in performing nuisance abatement while in conformance with current case law precedent.

II. SUBSTANDARD BUILDING ABATEMENT PROCEDURES UNDER CHAPTERS 54 AND 214 OF THE TEXAS LOCAL GOVERNMENT CODE

All property is held subject to a valid exercise of the government's police power to protect the public. City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 804 (Tex. 1984). In chapters 54 and 214 of the Texas Local Government Code, the Texas Legislature authorized cities to enact ordinances that provide for the abatement of substandard buildings. The "nuisance" definition in section 214.001(a)(1) of the Texas Local Government Code prohibits buildings that are "dilapidated, substandard, or unfit for human habitation and a hazard to the public health, safety, and welfare" based upon minimum standards that a city adopts by ordinance. Tex. Loc. Gov't Code § 214.001(a)(1) (Vernon 2012).

Chapter 54 provides for general enforcement authority and enabling procedures, to enforce health and safety ordinances dealing with fire safety, building construction, zoning, planning, and dangerous structures, through either: (1) a quasi-judicial building and standards commission ("BSC"); (2) an administrative hearing before an appointed hearing officer with appeal to the municipal court; or, (3) a civil action.[1] Chapter 214 also provides substantially similar authority to municipalities regarding the regulation and abatement of public nuisances; but, it provides a city with specific authority regarding substandard buildings and additional authority to secure substandard buildings.[2]

A. Administrative Abatement Under Chapters 54 and 214 of the Texas Local Government Code

The Texas Local Government Code permits municipalities to use their city council, BSCs, or Municipal Courts of record to abate substandard structures administratively.[3] Municipalities may enact ordinances that require the repair or demolition of a building that is "dilapidated, substandard, or unfit for human habitation and a hazard to the public health, safety, and welfare." Tex. Loc. Gov't Code § 214.001(a)(1) (Vernon 2012). The ordinance must: (1) establish minimum standards for the continued use and occupancy of all buildings regardless of the date of their construction; (2) provide for giving proper notice to the owner of a building; and, (3) provide for a public hearing to determine whether a building complies with the standards set out in the ordinance. Id. at § 214.001(b). Other stakeholders, such as mortgagees and lien holders, also must receive notice and an opportunity to be heard. Id. at § 214.001(d), (e), (g). Generally, the municipality must afford the owner or other interested parties a reasonable opportunity to repair or demolish a substandard building before the municipality takes such action itself. Id. at § 214.001(d), (e), (h)-(m).

Chapter 214 does not identify what type of municipal administrative body conducts public hearings or makes nuisance determinations,[4] but, it does authorize civil municipal courts to hold the public hearings under section 214.001.[5] Chapter 54 authorizes a city to establish separate quasi-judicial BSCs to hear and determine cases concerning alleged violations of public safety building ordinances.[6] The same general notice and public-hearing requirements described above apply in the chapter 54 proceedings. Tex. Loc. Gov't Code §§ 54.034(d) and 54.035 (Vernon 2012). But, the statute also contemplates that BSC hearings will be adversarial and adjudicative.

The municipality must designate an official to present cases to the BSC. Id. at § 54.034(c). The commission must adopt rules that provide "ample opportunity for presentation of evidence and testimony by respondents or persons opposing charges brought by the municipality." Id. at § 54.034(b). The Chairman of a BSC panel "may administer oaths and compel the attendance of witnesses." Id. at § 54.034(d). After a hearing, the commission may order the repair or demolition of a substandard building. Id. at § 54.036.

The Texas Local Government Code authorizes judicial review of a municipality's or a commission's order regarding a substandard building. Id. §§ 54.039, 214.0012. Chapter 214 states that any aggrieved owner, lien holder, or mortgagee may, within thirty calendar days after the order is mailed or delivered to them, file a verified petition for writ of certiorari in Texas District Court stating that the decision is illegal, in whole or in part, and specifying the grounds of the illegality. Id. at §214.0012(a). Chapter 214 provides

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1Alan Bojorquez. Texas Municipal Law and Procedure Manual § 23.01 (5th ed. 2010).

2 *Id*.

3 Chapter 54 authorizes a city to appoint a BSC to hear cases concerning violations of a building and standard ordinance. Tex. Loc. Gov't Code §54.033 (Vernon 2012). However, chapter 214 does not specify what type of body or official hears or conducts public hearings under section 214.001. *See*, Tex. Loc. Gov't Code §214.001(a)(1), (d) (only providing that a "municipality" conducts public hearings and may order a building be vacated, secured, repaired, removed, or demolished).

4*Id*. at § 214.001(a)(1), (d) (only providing that a "municipality" conducts public hearing and may order a building be vacated, secured, repaired, removed, or demolished).

5*Id*. at § 214.001(p) (providing that "a hearing under this subsection may be held by a civil municipal court").

6 *Id*. at §§ 54.031-.033.

that "appeal in the Texas District Court shall be limited to a hearing under the substantial evidence rule." Id. at § 214.0012(f). "The Court may reverse or affirm, in whole or in part, or may modify the decision brought up for review." Id. at §§ 54.039(f), 214.0012(f). If the decision of the municipality is affirmed or not substantially reversed (but only modified), the District Court must award the municipality all attorney's fees and other costs and expenses incurred by it. Id. at § 214.0012(h).

Prior to the issuance of Stewart I, many cities "relied almost exclusively on the building and standards process to address the most seriously substandard buildings."[7] After the Texas Supreme Court's opinion in Stewart II, the building and standards process remains viable. The clear, unambiguous and undisputed law holds that an unconstitutional taking cannot occur when the demolished structure was, in fact, a public nuisance when finally determined and demolished. Stewart II, 361 S.W.3d at 569. Any demolition order should contain specific findings of fact relied upon for the "nuisance" determination under the definition provided in the Texas Local Government Code. Before undertaking the administratively ordered demolition, municipalities should wait until the demolition order is final (31 days following the Order's service upon the property owner and no timely appeal) or the nuisance determination is judicially affirmed by a Texas District Court. Even so, government entities must prove the nuisance in fact and preserve that evidence as of the determination date and the actual demolition date. Id. at 565, 569.

After Stewart II, appeal to the District Court is no longer limited to a hearing under the substantial evidence rule[8]. Pursuant to the Court's holding in Stewart II, administrative nuisance determinations are now reviewed by the Trial Court de novo without deference to the administrative board's determination. Substantial evidence review is a limited standard of review requiring only more than a mere scintilla of evidence to support the municipality's or a board's nuisance determination. Id. at 566. The substantial evidence rule gives significant deference to the agency's determination and does not allow a court to substitute its judgment for that of the agency. De novo review is not limited and the administrative determination holds no deference with the Trial Court. Id. at 566, 580-81.

Stewart II applies when a timely appeal and takings claim are made to a Texas District Court. The cities' burden is now to prove a nuisance in fact at each procedural and judicial level. Of course, the burden eases with the obvious truth of the situation.

B. Unconstitutional Takings and Police Power

Before Stewart II (and after the decision), the Government still may not take a person's property without first paying just compensation. Tex. Const. Art. I, § 17(a) (Vernon 2012). [9] When the government acquires or damages valuable property without paying adequate compensation, Texas law provides that the owner may recover damages through an "inverse condemnation" suit against the Government. Westgate, Ltd. v. State, 843 S.W.2d 448, 452 (Tex. 1992).

Inverse condemnation suits are actions commenced by the landowner seeking compensation for the Government's taking or damaging valuable property through means other than formal condemnation. City of Houston v. Trail Enters., Inc., 300 S.W.3d 736 (Tex. 2009). Although inverse condemnation suits are initiated by a landowner rather than the State of Texas, they are similar to condemnation suits in that the rules of evidence and measure of damages are much the same. The Government's immunity from suit and liability is waived for a valid inverse condemnation ("takings") action. Steele v. City of Houston, 603 S.W.2d 786, 791 (Tex. 1980).

The Government may defend and defeat an inverse condemnation claim by showing that the property damaged or destroyed constituted a public nuisance. City of Texarkana v. Reagan, 247 S.W. 816, 817 (1923). This public-nuisance defense rests on a maxim of takings jurisprudence that "all property is held subject to the valid exercise of the police power." City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 804 (Tex. 1984). Based on this principle, Texas courts have long held "that the government commits no taking when it abates what is, in fact, a public nuisance." Reagan, at 247 S.W. at 817. The nuisance determination and/or judicial finding proves the structure is valueless. Stewart II, 361 S.W.3d at 574-75.

Accordingly, a municipality is not required to compensate a landowner for losses resulting from the destruction of a nuisance in fact.

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[7] J. Richie and J. Spugnardi, Substandard Building Issues: *City of Dallas v. Heather Stewart* and More, at pg. 5.

[8] Under a substantial evidence review, the trial court can only consider "the factual record made before the administrative body in determining whether substantial evidence supports the administrative board's order. *Stewart II*, 361 S.W. 3d at p. 566.

[9] The Texas Constitution states that "no person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made…." TEX. CONST. Art. I, § 17(a) (Vernon 2012).

III. THE STEWART OPINIONS

A. Stewart I

Heather Stewart abandoned her home in Dallas in 1991. During the subsequent ten years, Stewart's house fell into disrepair. It was occasionally occupied by vagrants. Neighbors filed complaints on the home and the City found that numerous violations existed. Stewart consistently ignored code enforcement notices issued by the City of Dallas (the "City" or "Dallas"). In September 2001, the Dallas Urban Rehabilitation Standards Board ("URSB" or "Board) reviewed prior complaints about the property and its general disrepair. The Board found the Stewart house to be an urban nuisance, and ordered its demolition. In September 2002, the Board denied Stewart's request for rehearing and affirmed its prior order. On October 17, 2002, a City Inspector found that Stewart had not repaired the property, and on October 28, the City obtained a judicial demolition warrant. The City demolished Stewart's house on November 1, 2002. City of Dallas v. Stewart, 2011 Texas Lexis 517 (Tex. 2011), opinion withdrawn by, City of Dallas v. Stewart 361 S.W.3d 562 (Tex. 2012) ("Stewart I").

Before the demolition, Stewart appealed the Board's decision to District Court, but the appeal did not stay the demolition order. See Tex. Loc. Gov't Code § 54.039(e) (Vernon 2012). After the demolition, Stewart amended her complaint to include a due process claim and a claim for an unconstitutional taking. The Trial Court, on substantial evidence review, affirmed the Board's finding that Stewart's home was an urban nuisance and awarded the City its attorney's fees. The Trial Court then severed Stewart's constitutional claims and tried them to a jury de novo. The jury rejected the City's contention that Stewart's home was a public nuisance and awarded her $75,707.67 in damages for the destruction of her house. The City appealed the judgment. Stewart I, 361 S.W.3d at 562.

At the Court of Appeals, the City argued that the Board's nuisance finding and its subsequent affirmation by the Trial Court precluded Stewart's takings claim as a matter of law under the principles of res judicata and collateral estoppel. City of Dallas v. Stewart, 360 S.W.3d 517, 518 (Tex. App.—Dallas 2008). The Dallas Court of Appeals affirmed the Trial Court's judgment, finding that de novo review of Stewart's takings claim was appropriate and that the Board's nuisance finding could not be preclusive because of the brief delay between the nuisance finding and the house's demolition. Id. at 519.

The City petitioned the Texas Supreme Court for review, arguing that the lower courts erred in failing to give the Board's nuisance determination preclusive effect in Stewart's taking claim. The Court granted the petition for review and on July 1, 2011, issued its original opinion in City of Dallas v. Stewart, ("Stewart I"). On review, the Texas Supreme Court affirmed the Court of Appeals' and the Trial Court's judgment. The Texas Supreme Court held that "substantial evidence review of a nuisance determination resulting in a home's demolition does not sufficiently protect a person's rights under Article I, Section 17 of the Texas Constitution," and that an administrative board's "nuisance determinations cannot be accorded preclusive effect in a takings suit…." The Texas Supreme Court stated:

> Today we hold that a system that permits constitutional issues of this importance to be decided by an administrative board, whose decisions are essentially conclusive, does not correctly balance the need to abate nuisances against the rights accorded to property owners under our constitution. In the context of a property owner's appeal of an administrative nuisance determination, independent court review is a constitutional necessity.
>
> Because we believe that unelected municipal agencies cannot be effective bulwarks against constitutional violations, we hold that the URSB's nuisance determination, and the trial court's affirmance of that determination under a substantial evidence standard, were not entitled to preclusive effect in Stewart's takings case, and the trial court correctly considered the issue de novo. [10]

See, Stewart I and Stewart II, supra.

After Stewart I, the City of Dallas and a number of Amici urged the Texas Supreme Court to grant rehearing. The movements argued that overturning the preclusive affect of an administrative nuisance determination would open the floodgates for takings claims. Due to the ten year statute of limitations on takings claims, abated property owners could challenge any and all demolitions that had occurred within the past ten years. The abating entities could be sued for each abatement, thereby effectively eliminating the government's ability to use the administrative process provided in 54 and 214 of the Texas Local Government Code. In response to the Motion for Rehearing, the Texas Supreme Court again addressed the issues on January 27, 2012. See Stewart I and Stewart II, supra.

[10] De novo judicial review: A court's non-deferential review of an administrative decision, usually through a review of the administrative record plus any additional evidence the parties present. Black's Law Dictionary 3 (9th ed. 2009).

B. Stewart II

After the Court's opinion in Stewart I, many cities brought their substandard structure and nuisance enforcement procedures to a halt. [11] They were concerned that the new requirement would delay an already slow administrative abatement process. [12] In response to Dallas' Motion for Rehearing and a number of Amicus Briefs, [13] the Texas Supreme Court withdrew its original opinion and substituted a new opinion, Stewart II. Stewart II is essentially the same as Stewart I but, the second opinion addresses the concerns raised by Dallas and the Amici.

The City and Amici argued that failing to accord administrative nuisance determinations preclusive effect would open the floodgates for takings claims because cities would be exposed to ten-years worth of takings claim litigation. They also argued that the Texas Supreme Court's decision in Stewart I effectively eliminated administrative nuisance abatement because cities lack the resources to file suit to abate every nuisance. The Texas Supreme Court dismissed these arguments stating that they overlooked three key facts: (1) takings claims must be asserted on appeal from the administrative nuisance determination; (2) property owners rarely invoke the right to appeal; and (3) de novo review is required only when a nuisance determination is appealed. Stewart II, 361 S.W.3d at 579.

Despite the clarifications provided in Stewart II, cities remain concerned over potential takings claims when they demolish a substandard structure using the administrative abatement procedures provided in the Texas Local Government Code.

IV. INTERPRETATION OF STEWART II

A. Takings claims must be asserted on appeal from the administrative nuisance determination

In support of the Motion for Rehearing, Dallas and the Amici argued that Stewart I would "open the floodgates for takings claims" due to the 10 year statute of limitations on takings claims. Id. at 579. The Texas Supreme Court dismissed this argument, stating that takings claims must be timely asserted on appeal from the administrative nuisance determination. Although agencies have no power to preempt a court's constitutional construction, a party asserting a taking must first exhaust its administrative remedies and comply with jurisdictional prerequisites for suit." Id. at 579. The Texas Supreme Court stated:

> A litigant must avail itself of statutory remedies that may moot its takings claim, rather than directly institute a separate proceeding asserting such a claim. If a remedial procedure might have obviated the need for a takings suit, then the property simply had not, prior to the procedure's use, been taken without just compensation. [14]

The Texas Supreme Court concluded that because a party cannot attack collaterally what he or she does not challenge directly, cities are not subject to new takings suits for long-concluded nuisance abatements. Id. at 579-80.

Patel v. City of Everman is on point. In that case, the Texas Supreme Court noted an administrative determination was properly appealed with a takings claim asserted. Patel v. City of Everman, 361 S.W.3d 600 (2012). Patel non-suited the case and the City demolished several of Patel's buildings. Patel again filed suit in both federal and state courts. The federal

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[11] *See, e.g.,* Laura Mueller, *City of Dallas v. Stewart*: Divided Supreme Court of Texas Holds That Nuisance Decisions Should Be Made by Courts Rather Than City Boards, Tex. City Attorneys Ass'n News, June/July 2011, at 3, available at http://www.tml.org/legal_tcaanews/News-June-July2011.pdf (stating many cities have halted their nuisance ordinance enforcement until this rehearing is decided). Rudolph Bush, Texas Supreme Court Wants To Hear More About Dallas's Demolition of 'Nuisance' Property, Dallas Morning News, Oct. 20, 2011, available at http://cityhallblog.dallasnews.com/archives/2011/10/texas-supreme-court-wants-to-h.html (noting that "[m]any, if not all, of those cities have since stopped destroying nuisance properties absent a court order").

[12] *See, e.g.,* Patricia Kilday Hart, Hart: Whose Property Rights Are Being Protected?, The Houston Chronicle, Jan. 7, 2012, available at http://www.chron.com/news/kilday-hart/article/Hart-Whose-property-rights-are-being-protected-2448385.php (suggesting the Court's opinion "has made it more difficult for municipalities to order demolitions of abandoned nuisances," noting that demolition orders—following a nuisance finding by the municipal board—are now likely to only be acted upon when public health and safety risks outweigh the exposure of a takings claim).

[13] The International Municipal Lawyers Association, the Texas City Attorneys Association, the Texas Municipal League and the cities of Bryan, Abilene, Aledo, Cleburne, Euless, Fort Worth, Garland, Granbury, Haltom City, Houston, Irving, Kennedale, Lake Worth, McAllen, Mesquite, North Richland Hills, River Oaks, Saginaw, San Antonio, Southlake and Sulphur Springs submitted Amicus Curiae Briefs in support of the Motion for Rehearing. The Solicitor General also submitted a consistent brief on behalf of the State of Texas as Amicus Curiae.

[14] In *Stewart II*, the court applied this rationale stating that "had Stewart convinced the URSB that her property was not a nuisance, the City would not have obtained a demolition order, and Stewart's takings claim would fail. Because she was unsuccessful before the Board, she properly asserted her takings claim on appeal to district court."

litigation terminated in the city's favor (as did the state litigation). Id. at 600-01.

The state court eventually granted the City's Motion for Summary Judgment and the Court of Appeals affirmed, holding that Patel's failure to pursue an appeal of the administrative nuisance finding barred his taking claim. Recall that Patel non-suited his direct attack on the administrative ruling regarding his buildings and he did not seek judicial review of the Board's Order within the thirty-day period prescribed by section 214.0012 of the Texas Local Government Code. Accordingly, Patel was collaterally stopped from now bringing the state court action. Patel, 361 S.W.3d at 601.

The Texas Supreme Court upheld its decision in Stewart II and ruled that a party asserting a taking must first exhaust its administrative remedies and comply with the jurisdictional prerequisites for suit. Appeal of the administrative nuisance determination must be a timely and the appellant must assert his/her taking claim in that proceeding. Accordingly, Patel could not file another lawsuit outside of the initial proceeding. Id. at 601-02. Stewart II, 361 S.W.3d at 601-02; Stewart I, S.W.3d at 579-80.

B. Property owners rarely invoke the right to appeal.

Public abatement statistics show that administrative determinations are rarely appealed. [15] The Texas Supreme Court noted this may be due to: (1) the correctness of the nuisance finding; (2) the time and expense involved [16]; (3) the Texas Local Government Code's narrow thirty day window for seeking review [17]; or, (3) because an unsuccessful appellant must pay the municipality's attorney's fees and costs. [18] Stewart II, 361 S.W.3d at 580. Although administrative nuisance determinations are now reviewed de novo by the trial court, the number of appeals from administrative nuisance determinations arguably should not increase.

C. De novo review is required when a nuisance determination is appealed.

Finally in support of the Motion for Rehearing, the Amici argued that Stewart I "effectively eliminates administrative nuisance abatement because cities lack the resources to file suit to abate every nuisance." Id. at 579. In response to this argument, the Texas Supreme Court stated that "[de] novo review is required only when a nuisance determination is appealed." Id. at 580. Therefore, cities are not required to institute court proceedings to abate every nuisance. Rather, cities must only defend the rare appeals of nuisance determinations and takings claims timely asserted in District Court by property owners who lost before the agency. Therefore, cities can continue using BSC or city council to make nuisance determinations and demolish substandard structures. Id. at 579-580.

The Texas Supreme Court and the Fifth Court of Appeals have addressed the de novo review subsequent to Stewart II. The Texas Supreme Court held that the substantial evidence rule does not operate to restrict a claimant's evidence on his takings claim. The Fifth Court of Appeals subsequently ruled that compensable exactions are constitutional takings which require ultimate judicial determination. The judicial review is not limited to the substantial evidence standard. Fifth Court of Appeals subsequently ruled that compensable exactions are constitutional takings which require ultimate judicial determination. The judicial review is not limited to the substantial evidence standard. The Edwards Aquifer Authority and the State of Texas v. Day, 2012 Tex. LEXIS 161 (Tex. 2012); Mira Mar Development Corporation v. City of Coppell, Texas, 364 S.W.3d 366, 395 – 396 (Tex. App. – Dallas, 2012).

V. ADMINISTRATIVE ABATEMENT AFTER STEWART II

The Texas Supreme Court's decisions in Stewart II and Patel v. City of Everman, 361 S.W.3d 600 (Tex. 2012), address concerns raised by Dallas and the Amici. Dallas and the Amici argued in favor of the preclusive effect of administrative determinations of nuisance and the limited substantial evidence review by a District Court. They warned of takings lawsuits and of the Government's inability to manage public nuisances by judicial review. The Texas Supreme Court overruled the Motion for Rehearing and dismissed the Movant's arguments noting three key facts that would preclude expensive judicial review: (1)

[15] The City of Fort Worth states that over the past ten years it has brought 1,250 cases to its Building Standards Commission, and fewer than ten of those were appealed to district court. The City of Sulphur Springs has abated 86 structures by demolition over the past five years; in 68 of those abatements, the property owner acquiesced in the demolition order. The City of Mesquite has taken 18 cases to its Building Standards Board since 2009. Of those 18, 15 were ordered demolished, and 14 have been demolished.

[16] Municipalities can assess litigation costs and the civil penalties against property owners who fail to comply with repair or demolition orders. *See, e.g.*, *Freeman*, 242 F.3d at 645 (noting that the URSB could impose penalties of up to $2000 per day) (citing Dallas, Tex., Code ch. 27, art. II, § 27-8).

[17] TEX. LOC. GOV'T CODE § 214.0012(a) (requiring appeals to be filed within thirty days of order).

[18] section 214.0012 (h) (requiring appellant to pay municipality's attorney's fees, costs, and expenses, if municipality's decision is affirmed or "not substantially reversed").

takings claims must be asserted on appeal from the administrative nuisance determination; (2) property owners rarely invoke the right to appeal; and (3) de novo review is required only when a nuisance determination is appealed. Stewart II, 361 S.W.3d at 579-580.

A. Nuisance in Fact

Prior to the issuance of Stewart I, many cities "relied almost exclusively on the building and standards process to address the most seriously substandard buildings."[19] After the Texas Supreme Court's opinion in Stewart II, the building and standards process remains viable. The clear, unambiguous and undisputed law holds that an unconstitutional taking cannot occur when the demolished structure was, in fact, a public nuisance when finally determined and demolished. Id. at 569. Any demolition order should contain specific findings of fact relied upon for the "nuisance" determination under the definition provided in the Texas Local Government Code. Before undertaking the administratively ordered demolition, municipalities should wait until the demolition order is final (31 days following the Order's service upon the property owner and no timely appeal) or the nuisance determination is judicially affirmed by a Texas District Court. Even so, government entities must prove the nuisance in fact and preserve that evidence as of the determination date and the actual demolition date. Id. at 565, 569.

After Stewart II, appeal to the District Court is no longer limited to a hearing under the substantial evidence rule. [20.] Pursuant to the Court's holding in Stewart II, administrative nuisance determinations are now reviewed by the Trial Court de novo without deference to the Administrative Board's determination. Substantial evidence review is a limited standard of review requiring only more than a mere scintilla of evidence to support the municipality's or a Board's nuisance determination. Id. at 566. The substantial evidence rule gives significant deference to the agency's determination and does not allow a court to substitute its judgment for that of the agency. De Novo review is not limited and the administrative determination holds no deference with the Trial Court. Id. at 566, 580-81.

Stewart II applies when a timely appeal and takings claim are made to a Texas District Court. The cities' burden is now to prove a nuisance in fact at each procedural and judicial level. Of course, the burden eases with the obvious truth of the situation.

B. Exhaustion of Administrative Remedies – Timely Appeal

Under Chapters 54 and 214, a person must appeal a municipality's order within 30 days of service of the order. Tex. Loc. Gov't Code §§ 54.039, 214.0012 (Vernon 2012). As the Court stated in Stewart II, takings claims must be asserted on appeal from the administrative nuisance determination. Id. at 579-580. Therefore, a property owner cannot assert a takings claim unless the nuisance determination is appealed within 30 days of service and the property owner brings the takings claim in that appeal. If the owner fails to exhaust its administrative remedies, the property owner's takings claim will be precluded.

After the Court's holding in Stewart II, municipalities can continue to use the city council or BSC abatement process, wait until the "narrow thirty day window for seeking review" has passed, confirm the lack of appeal, again confirm and record the nuisance in fact, and then demolish the substandard structure. Id. If an owner does not appeal the demolition order within the thirty-day statutory period, cities should seek dismissal of takings claims filed after that period on the basis that the owner failed to exhaust its administrative remedies. The opinion in Stewart II, read in conjunction with the Patel opinion, appears to support the conclusion that a takings claim will be precluded unless the property owner or other aggrieved person appeals the nuisance determination within thirty days of service and asserts the takings claim in that appeal. [21]

In Patel v. City of Everman, a property owner asserted a takings claim on appeal from an administrative determination that his property was a nuisance. Patel, 361 S.W.3d at 600-01. Although that was the proper forum for litigating his takings claim, he then non-suited the case. He again filed suit alleging an unconstitutional taking. Summary Judgment was granted against Patel and he unsuccessfully appealed . On appeal to the Texas Supreme Court, the owner argued that the Court of Appeals wrongly concluded that collateral estoppel precluded his takings claim. Relying on its opinion in Stewart II, the Texas Supreme Court stated that:

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[19] J. Richie and J. Spugnardi, Substandard Building Issues: *City of Dallas v. Heather Stewart* and More, at pg. 5.

[20] Under a substantial evidence review, the trial court can only consider "the factual record made before the administrative body in determining whether substantial evidence supports the administrative board's order. *Stewart II* supra at pt. 566.

[21] In Stewart II, the court noted one commentator's statement that "even though [a constitutional] claim may be asserted for the first time in the District Court upon appeal of the agency order, a failure to comply with the appeal deadlines and/or the failure to so assert the constitutional claim at that time, precludes a party from raising the issue in a separate proceeding." 1 Beal, Texas Administrative Practice and Procedure § 9.3.1[c];

> We recently held that a party asserting a taking based on an allegedly improper administrative nuisance determination must appeal that determination and assert his takings claim in that proceeding. We noted that although agencies have no power to preempt a court's constitutional construction, a party asserting a taking must first exhaust its administrative remedies and comply with jurisdictional prerequisites for suit. We also held that a litigant must avail [himself] of statutory remedies that may moot [his] takings claim, rather than directly institute a separate proceeding asserting such a claim.

Id. at 601. The Texas Supreme Court held that the owner could not attack collaterally what he failed to challenge directly and that the owner's takings claim was barred. Id.

Pursuant to Stewart II and Patel, it appears that if an owner or other aggrieved party does not appeal the administrative nuisance determination within thirty days of service of the order, the City may demolish the building and the party's takings claim will be precluded. Id. at 600-01 and Stewart II, 361 S.W.3d at 579-580.

C. Ripeness

On the other hand, some have argued that if the property owner asserts a takings claim before the property has been demolished, the City should assert the defense of ripeness. [22] Article I, Section 17 of the Texas Constitution provides that "no person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made…." Tex. Const. Art. I, Sec. 17. In Stewart II and Patel, the Texas Supreme Court holds that a property owner must timely appeal the nuisance determination and bring a takings claim (for a taking that has not yet occurred). Thus, the argument is that if a property owner asserts a takings claim on appeal from the administrative nuisance determination (and before demolition), the City has not "taken, damaged, or destroyed" the owner's property because the demolition has not occurred (not ripe for litigation). [23]

If the property owner correctly asserts a takings claim on timely appeal from an administrative nuisance determination (before the property has been demolished) and the Trial Court affirms the administrative nuisance determination, the landowner has no takings claim (because the government commits no taking when it abates what is, in fact, a public nuisance). City of Texarkana v. Reagan, 112 Tex. 317, 247 S.W. 816, 817 (Tex. 1923). On the other hand, if the Trial Court reverses the administrative nuisance determination (again on appeal before demolition), the City cannot demolish the landowner's building and the landowner has no takings claim (because the structure remains). Therefore, the City will not incur any liability.

If the property owner correctly asserts a takings claim on timely appeal from the administrative nuisance determination and after demolition, the landowner's takings claim will be ripe for review (because the valuable building was demolished before judicial review). The City will incur liability for demolishing Stewart's valuable structure. Stewart II, 361 S.W.3d at 569.

D. Res Judicata and Collateral Estoppel

In general, the doctrine of res judicata is comprised of two distinct categories: res judicata (claim preclusion) and collateral estoppel (issue preclusion). Barr v. Resolution Trust Corp., 837 S.W.2d 627, 628 (Tex. 1992). Res judicata, or claim preclusion, bars the re-litigation of claims that have been finally adjudicated or could have been litigated in the previous action. Amstadt v. U.S. Brass Corp., 919 S.W.2d 644, 652 (Tex. 1996). Collateral estoppel, or issue preclusion, prevents the re-litigation of identical issues of fact or law that were actually litigated and essential to the final judgment in a prior suit. Barr, 837 S.W.2d at 627-28.

1. Res Judicata

The issue in Stewart II was whether the URSB's nuisance determination was res judicata. [24] That is, should it have been a dispositive affirmative defense to Ms. Stewart's claim? Stewart II , 361 S.W.3d at 575. The Court concluded that "because substantial evidence review of an agency's nuisance determination resulting in a home's demolition does not sufficiently protect a person's rights under Tex. Const. Art. I, §17," the Board's determination was not preclusive (res judicata). Substantial evidence review is a limited standard of review requiring only more than a mere scintilla of evidence to support the Municipality's or a Board's nuisance determination. The substantial

[22] *See* J. Richie and J. Spugnardi, Substandard Building Issues: *City of Dallas v. Heather Stewart* and More, at 9-10 (arguing that if a property owner files a taking claim before the building has been demolished, the City should file a plea to the jurisdiction on the basis that the takings claim is not ripe.

[23] *Id.*

[24] Res judicata, or claim preclusion, bars the re-litigation of claims that have been finally adjudicated or could have been litigated in the previous action. *Amstadt v. U.S. Brass Corp*., 919 S.W.2d 644, 652 (Tex. 1996).

evidence rule gives significant deference to the agency's determination and does not allow a court to substitute its own judgment for that of the agency. Stewart II, 361 S.W3d 565-66. The Court stated that:

> Accountability is especially weak with regard to municipal-level agencies that are created by cities that typically lack the separation of powers of the state and federal governments.
>
> Our precedents make clear that nuisance determinations must ultimately be made by a court, not an administrative body, when the property owner contests the administrative finding.

Id. 565-66. Post Stewart II, it is clear that the defense of res judicata will not apply to the District Court appeal of administrative nuisance determinations.

2. Collateral Estoppel

As the Court stated in Stewart II and Patel, a party cannot attack collaterally what he or she does not challenge directly. Therefore, if a landowner fails to appeal the administrative nuisance determination within the thirty-day period and does not assert the takings claim in that appeal, the landowner's claim will be precluded under the doctrine of collateral estoppel. However, if a building is demolished before a board's order is affirmed on timely appeal, a property owner can amend the petition and add a takings claim to the case appealing the order. If the decision is reversed by the trial court after the building has been demolished by the City, there will be nothing to preclude the landowner from successfully asserting a takings claim. Id. at 565-66.

VI. SUBSTANTIAL EVIDENCE REVIEW

As the Court stated in Stewart II, "de novo review is required only when a nuisance determination is timely appealed." Id. at 580. Nuisance determinations are only necessary when a city is taking an action that arguably constitutes a taking, because the nuisance finding prevents a property owner's takings claim. Id. at 559. Although the demolition of a substandard structure may constitute a taking, the other powers of municipal boards in addressing substandard structures do not qualify as takings. For example, BSC orders requiring property owners to secure or make repairs to their property under section 214.001 of the Texas Local Government Code would not qualify as a taking under the Texas Constitution.

Therefore, BSC orders requiring repairs, securing, or civil penalties remain subject to the substantial evidence rule under section 54.039(f) of the Texas Local Government Code. After Stewart II, cities can continue the administrative abatement process, with additional attention to evidence proving the nuisance and confirmation that appeal was not timely. If a landowner appeals the municipal board's nuisance determination, cities will be proving the nuisance de novo in district court (and hopefully before demolition).

VII. ALTERNATIVES TO BUILDING AND STANDARDS COMMISSIONS

A. Municipal Court Proceedings Pursuant to Chapter 214

Under section 30.00005 of the Texas Local Government Code, the governing body of a City, by ordinance, may provide its Municipal Court of Record with civil jurisdiction for purposes of enforcing municipal ordinances enacted under Chapter 214 of the Texas Local Government. Tex. Loc. Gov't Code §30.00005. In addition, section 30.00005 provides that a Municipal Court of Record has concurrent jurisdiction with a District Court or County Court at Law under subchapter B of chapter 54 of the Texas Local Government Code within the corporate city limits and the city's extraterritorial jurisdiction for purposes of enforcing health and safety and nuisance abatement ordinances. Id. Therefore, cities can file chapter 54 judicial abatement proceedings in Municipal Courts of Record as well as District or County courts.

One benefit of a chapter 214 Municipal Court proceeding is that the nuisance determination is made by a Judge and not an administrative body or a "panel of citizens untrained in constitutional law." Stewart I, 361 S.W.3d at 562. However, Stewart II stated that "unelected municipal agencies cannot be effective bulwarks against constitutional violations." Stewart II, 361 S.W.3d at 580. Because Municipal Court Judges are not elected, nuisance determinations will still be subject to de novo review on appeal. Id. at 580.

B. Judicial Abatement Under Chapter 54

Under section 54.012, a municipality may bring a civil action for the enforcement of an ordinance "relating to dangerously damaged or deteriorated structures or improvements." Tex. Loc. Gov't Code §54.012(6) (Vernon 2012). The jurisdiction and venue of an action under section 54.012 are in the District Court or the County Court at Law of the County in which the municipality bringing the action is located. Id. Section 54.014 permits Cities to seek preferential settings for the suit. "If the municipality submits to the Court a verified motion that includes facts that demonstrate that a delay will unreasonably endanger persons or property, the Court is required to give a preference to the action brought by the municipality when setting cases filed under this subchapter." Id. If the City prevails in the civil action brought for

enforcement of its ordinances, it may be entitled to injunctive relief and civil penalties. Id.

C. Administrative Abatement vs. Judicial Abatement of Substandard Structures

There are conflicting views on the costs and benefits of using either the judicial abatement or administrative abatement procedures and whether municipalities should continue to use the administrative abatement process or institute court proceedings under chapter 54 to abate every nuisance. After Stewart II, there does not appear to be any consensus on which procedures municipalities should follow when demolishing substandard buildings. Some contend that the "chapter 54 proceeding is the clearest way to comply with Stewart's holding that 'unelected municipal agencies cannot be effective bulwarks against constitutional violations' because it is brought in District or County Court, which are presided over by an elected judge. Stewart II, 361 S.W.3d at 580. [25] Others contend that using appointed building and standards boards to make nuisance determinations under the administrative abatement process "remains valuable and viable to cities to address substandard structures, but cities should consider options for bolstering the process." [26]

There is also disagreement on which process is the least expensive and time-consuming. Some contend the judicial abatement process under chapter 54 is the most expensive and time-consuming route. While others contend that the judicial abatement process under chapter 54 is "cheap and quick" and that "many cities' councils, staff, and attorneys have the misperception that chapter 54 lawsuits are expensive and slow." [27] Although there are different opinions concerning the costs and benefits of the judicial and administrative abatement procedures, after Stewart II it is clear that both procedures are still viable options for municipalities when demolishing substandard buildings.

In any case, the best choice for a municipality post Stewart II is to use the process that the entity is most comfortable with to address its particular needs. Stewart II should not have a significant impact on the administrative procedures under chapters 54 and 214. The government must prove a nuisance in fact and the landowner must timely, and successfully, appeal and claim a taking. If a city used the administrative abatement process pre Stewart, it should continue using that process post Stewart.

VIII. PRACTICE TIPS AND CONCLUSION

The Texas Supreme Court's opinion in Stewart I caused much confusion about municipal abatement of substandard structures. However, the Court's substituted opinion in Stewart II read in conjunction with Patel v. City of Everman appears to have cleared up concerns that Stewart I created. As discussed above, after Stewart II, cities can continue using the BSC process provided in chapters 54 and 214. However cities should strengthen their administrative abatement process by ensuring that relevant and admissible evidence is included in the findings of fact. Also, if cities choose to use their building and standards commission to demolish substandard structures, the safest route is to wait to demolish until after the time for an appeal has expired [28] or the appeal proceeding is completed and the administrative order was affirmed.

The clear, unambiguous and undisputed law still holds that an unconstitutional taking cannot occur when the demolished structure was, in fact, a public nuisance (when finally determined and demolished). Any demolition order should contain specific findings of fact relied upon for the "nuisance" determination under the definition provided in the Texas Local Government Code. For instance, the property owners, mortgagees and lien holders should be identified and provided notice as well as service of the final determination and order of demolition. The city should take photographs confirming the determined "nuisance" status as well as the substandard property's condition on the date of demolition. All inspection forms should be completed and tendered as exhibits in support of the city's position. The property's location should be mapped to the nearest school, church and day care. The city should produce and provide any and all appraisals taken of the premises in question. The city should provide a background history of complaints, ordinance violations, permit violations and criminal activity on the premises. Historical Societies may be contacted with regard to potentially historical structures. The environmental surveys and other similar reports, if any, should also be included as evidence of the substandard structure. Finally, the government entity should review the property records, county deed records, and court records for sales, notices and appeals of the BCS determination.

Before the structure is demolished, the city should confirm service of the appealable order,

[25] S. Houston and B. Goldstien, Substandard Structures after *City of Dallas v. Stewart*, at 14.

[26] J. Richie and J. Spugnardi, Substandard Building Issues: *City of Dallas v. Heather Stewart* and More, at 5.

[27] *Id.* at 29.

[28] without appeal, or thirty days from the date the property owner is served with a copy of the administrative decision. TEX. LOC. GOV'T CODE §§54.039(a), 214.0012(a).

non-existence of appeal, confirm the evidentiary basis for the nuisance determination as well as the continued status of the nuisance; and finally, the city should photographically record the demolition. Only in this way, does the city insulate itself from unsuccessful litigation. Even so, government entities must prove the nuisance in fact and preserve the evidence as of the determination date and the actual demolition date. Stewart II, 361 S.W.3d at 565, 569; Kinnison v. City of San Antonio, 2012 U.S. App. LEXIS 10937 (5th Cir. 2012).