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## Texas after *City of Dallas v. Stewart*: Police Nuisances Or City Police Power Abated

Lindsay Matthews

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**TEXAS AFTER CITY OF DALLAS v. STEWART:  
PUBLIC NUISANCES OR CITY POLICE  
POWER ABATED?**

*Lindsay Matthews*<sup>†</sup>

I. INTRODUCTION..... 206  
     A. *The Need for Public Nuisance Abatement in Texas* . 206  
     B. *The Holding in City of Dallas v. Stewart*..... 207  
     C. *Texas Cities can Still Effectively Abate Public Nuisances* ..... 208  
 II. BACKGROUND: THE TRADITIONAL TEXAS APPROACH TO PUBLIC NUISANCE ABATEMENT ..... 208  
     A. *Intent of the Texas Legislature* ..... 208  
     B. *Current Legislation Regarding Public Nuisance Abatement* ..... 209  
     C. *The Texas Legislature Delegates Abatement Power to City Officials*..... 210  
     D. *City Police Power* ..... 210  
     E. *The Substantial Evidence Review Standard* ..... 212  
     F. *Administrative Boards are Viewed as Best Suited to Determine Public Safety Hazards* ..... 213  
 III. CITY OF DALLAS v. STEWART: THE SUPREME COURT OF TEXAS RULES THAT A PUBLIC NUISANCE DETERMINATION BY A CITY BOARD DOES NOT PRECLUDE A STATE TAKINGS CLAIM ..... 214  
     A. *Background Facts and Procedure* ..... 214  
     B. *Motion for Rehearing Denied* ..... 216  
         1. Substantial Evidence Review Standard Inadequate..... 216  
         2. Accountability of Municipal Boards ..... 217  
         3. Vagueness of the Texas Local Government Code ..... 217  
     C. *Uproar Over Stewart: The Issue of City Financial Woes During the Recession* ..... 218  
 IV. MUNICIPALITIES ARE NOT STRIPPED OF PUBLIC NUISANCE ABATEMENT POWER..... 219

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206 TEXAS WESLEYAN J. OF REAL PROPERTY LAW [Vol. 1

A. *Regulatory Takings are Inherently Different than Physical Takings* ..... 219

    1. Investment-Backed Expectations ..... 220

    2. Substantial Economic Impact ..... 221

    3. Targets the Community as a Whole..... 223

B. *Property Owners must Appeal Demolitions Within Thirty Days of the Abatement Order* ..... 224

    1. Administrative Remedies must be Exhausted... 225

    2. Time Limit to Appeal Begins Immediately Following the Board’s Decision ..... 226

C. *A Very Small Amount of Public Nuisance Determinations are Appealed*..... 227

V. CONCLUSION: PUBLIC NUISANCES, NOT CITY POLICE POWER, WILL BE ABATED ..... 229

PART I. INTRODUCTION

A. *The Need for Public Nuisance Abatement in Texas*

The current economic recession has been the single worst in the United States since the Great Depression.<sup>1</sup> In 2010, 46.2 million people were living at or below the poverty level.<sup>2</sup> As a result of the nation’s economic downturn and unemployment rates, there has been an onslaught of municipal decay and abandoned buildings.<sup>3</sup> Nonseasonal vacant properties increased from 7 million in the year 2000 to 10 million in the year 2010.<sup>4</sup> Texas, in particular, experienced a 41% to 50% increase in the number of vacant properties in its cities.<sup>5</sup>

Public nuisances such as deteriorating buildings, pest infestations, and overgrown vegetation commonly result from these neglected properties.<sup>6</sup> Their presence has a negative effect on the quality of life of people living in communities nationwide.<sup>7</sup> In the wake of the reces-

1. Bob Willis, *U.S. Recession Worst Since Great Depression, Revised Data Show*, Bloomberg, (Aug. 1, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=anivTjr852TI>.

2. Carmen DeNavas-Walt, *Income, Poverty, and Health Insurance Coverage in the United States: 2010*, United States Census Bureau, 14 (Sept. 2011), <http://www.census.gov/prod/2011pubs/p60-239.pdf>.

3. Mathew J. Scirè, *Vacant Properties: Growing Number Increases Communities’ Costs and Challenges*, United States Government Accountability Office, 2 (Nov. 2011), <http://www.gao.gov/assets/590/586089.pdf>.

4. *Id.* at 12.

5. *Id.* at 14.

6. TEX. LOC. GOV’T CODE ANN. § 54.032(4)-(5) (West 2008); Matthew J. Samsa, *Reclaiming Abandoned Properties: Using Public Nuisance Suits and Land Banks to Pursue Economic Development*, 56 CLEV. ST. L. REV. 189, 191 n.12 (2008) (stating lack of upkeep “generally creates the conditions which amount to a nuisance.”).

7. City of Dallas v. Stewart, 361 S.W.3d 562, 564 (Tex. 2012); David T. Kraut, *Hanging Out the No Vacancy Sign: Eliminating the Blight of Vacant Buildings from Urban Areas*, 74 N.Y.U. L. REV. 1139, 1139 (1999) (stating “in urban communities across the country, vacant buildings haunt neighborhoods, blighting the city land-

sion more than ever, Texas has been faced with the need to abate public nuisances in an effort to keep its communities safe and to rehabilitate its cities.

### B. *The Holding in City of Dallas v. Stewart*

City officials have traditionally dealt with public nuisance abatement by holding quasi-judicial administrative hearings conducted by city-appointed boards.<sup>8</sup> When a board made an affirmative public nuisance determination, the property owner could appeal the decision to district court.<sup>9</sup> The property owner was not entitled to a new trial, or de novo review, of the board's decision; rather, the record would be reviewed under the substantial evidence review standard to see if "it would be *possible* for a reasonable fact-finder to reach the same conclusions that the administrative fact-finder did."<sup>10</sup>

However, in the recent decision of *City of Dallas v. Stewart*, the Supreme Court of Texas rejected the traditional method of public nuisance abatement appeals described above.<sup>11</sup> It stated that an administrative board's determination of a public nuisance did not preclude a property owner's right to file a state takings claim for the destruction of her house.<sup>12</sup> The Court ruled that a property owner is entitled to a de novo review standard with regard to a state takings claim arising out of a demolition.<sup>13</sup>

The City of Dallas' Motion for Rehearing was denied on January 27, 2012.<sup>14</sup> Now that the Supreme Court of Texas has stated that administrative boards' determinations of public nuisances are inadequate to protect against unconstitutional takings, many city officials

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scape, lowering surrounding property values, increasing crime and the risk of fire, and posing hazards to children.").

8. See generally TEX. LOC. GOV'T CODE ANN. § 54.032.

9. TEX. LOC. GOV'T CODE ANN. §§ 54.039(f), 214.0012(f).

10. TEX. GOV'T CODE ANN. § 2001.174 (defining reversible error on substantial evidence review.); OR TEX. GOV'T CODE ANN. § 2001.174 (defining reversible error on substantial evidence review); Swain v. Bd. of Adjustment, 433 S.W.2d 727, 730 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.) ("The only question which may be properly raised in a review of the decision of the Board of Adjustment . . . is that of the legality of the board's order."); See also TEX. LOC. GOV'T CODE ANN. §§ 54.039(f); 214.0012(f); US LEGAL, INC., <http://appeals.uslegal.com/standards-of-review/substantial-evidence-standard/>, (last visited September 16, 2012).

11. *Stewart*, 361 S.W.3d at 564 (stating "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.").

12. *Id.* at 566, 580. See also Amicus Brief Texas Municipal League, *Stewart*, 361 S.W.3d 562 (Tex. 2012).

13. *Id.* at 580–81 (stating "The protection of property rights. . . should not—indeed, cannot—be charged to the same people who seek to take those rights away.").

14. *Id.* at 564.

208 TEXAS WESLEYAN J. OF REAL PROPERTY LAW [Vol. 1

question whether they can effectively exercise city police power to abate health and safety hazards.<sup>15</sup>

C. *Texas Cities can Still Effectively Abate Public Nuisances*

This Note provides an overview of the traditional approach to public nuisance abatement and the recent *City of Dallas v. Stewart* opinion. It then recommends that cities can still abate public nuisances, and emphasizes three points that were touched on in the Court's opinion:

- 1) There is a difference between tearing down a structure and maintaining real property for health and safety purposes. Fines and orders to maintain property in accordance with municipal ordinances are not physical takings. Furthermore, fines and orders are not regulatory takings if they do not interfere with distinct investment-backed expectations, target the community as a whole, and do not have a substantial economic impact on the individual property owner;
- 2) Actual demolitions of structures must be appealed within thirty days of the board's order and the appellant is responsible for a city's attorney fees and court costs if he loses, and finally;
- 3) The majority of public nuisance determinations made by city boards are not appealed by property owners.

PART II. BACKGROUND: THE TRADITIONAL TEXAS APPROACH TO PUBLIC NUISANCE ABATEMENT<sup>16</sup>

A. *Intent of the Texas Legislature*

Article I section 17 of the Texas Constitution states that the government may not take a person's property without just compensation.<sup>17</sup> However, it has also been established that the government does not commit a taking of property when it abates a public nuisance.<sup>18</sup> In the 1800s, the Supreme Court of Texas stated that the Legislature had the authority to declare what constitutes a safety hazard.<sup>19</sup> Since then, the

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15. *Id.* at 579 (stating "the amici assert that our decision effectively eliminates administrative nuisance abatement because cities lack the resources to file suit to abate every nuisance").

16. Brief for City of Fort Worth as Amicus Curiae supporting Petitioner, *Stewart*, 361 S.W.3d 562 (Tex. 2012) (No. 09-0257), available at <http://www.supreme.courts.state.tx.us/ebriefs/files/20090257.htm> (The author of this Note assisted the City of Fort Worth with research associated with its Amicus Brief in support of the City of Dallas. Numerous references are made in this Note to various amici's briefs of Texas cities and the Texas Municipal League.).

17. Tex. Const. art. I, § 17(d).

18. *Stewart*, 361 S.W.3d at 569 (stating "A maxim of takings jurisprudence holds that 'all property is held subject to the valid exercise of the police power.'" (quoting *College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 804 (Tex. 1984))).

19. Brief for the Texas Municipal League as Amicus Curiae supporting Petitioner, *Stewart*, 361 S.W.3d 562 (Tex. 2012) (No. 09-0257) ((citing *City of Waco v. Powell*, 32 Tex. 258, 268 (1869) "[a]s far back as 1858, this Court accepted the legislature's ability

2012] TEXAS AFTER *CITY OF DALLAS* v. *STEWART* 209

Court has stated that the Legislature can delegate public nuisance abatement to city-appointed municipal boards.<sup>20</sup>

The legislative intent behind the delegation of public nuisance abatement has been very clear over the last forty years. In 1975, the Texas Legislature passed House Bill 340.<sup>21</sup> The purpose of H.B. 340 was to permit Texas cities to “adopt ordinance[s] which would require the demolition or repair of substandard buildings that constitute a hazard to the health, safety, and welfare of citizens.”<sup>22</sup> In 1993, House Bill 333 was passed.<sup>23</sup> It mandated that courts use the substantial evidence standard when reviewing administrative boards’ decisions.<sup>24</sup> The bill analysis for H.B. 333 stated that the substantial evidence review standard allowed “quicker action” that would prevent district-court judges from re-trying cases already decided by city boards.<sup>25</sup> Legislation such as H.B. 340 and H.B. 333 led to the current system of public nuisance abatement in Texas cities.

### B. *Current Legislation Regarding Public Nuisance Abatement*

In present day, there is specific legislation allowing cities to make nuisance determinations regarding substandard buildings. Texas Local Government Code section 214 states that a municipality may, through the authorization of a city ordinance, have the power to demolish structures that are “dilapidated, substandard, or unfit for human habitation and a hazard to the public health, safety, and welfare” of a city.<sup>26</sup> Section 214 also states that the city ordinance must

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to enact legislation that allowed a city’s “board of aldermen” to “as far as practicable, prevent any nuisances within the limits of the corporation, and cause such as exist to be removed, at the expense of the persons by whom they were occasioned.”)

20. Pet’r’s Mot. for Reh’ing, Pg. 8 (citing *City of Houston v. Lurie*, 224 S.W.2d 871, 874 (Tex. 1949) “[t]he Court has acknowledged that the State can define a nuisance that is in fact a nuisance.”).

21. Brief for City of Fort Worth as Amicus Curiae supporting Petitioner at 7, *Stewart*, 361 S.W.3d 562 (Tex. 2012) (No. 09-0257), available at <http://www.supreme.courts.state.tx.us/ebriefs/files/20090257.htm> (citing House Comm. on Intergovernmental Affairs, Bill Analysis, Tex. H.B. 340, 64th Leg., R.S. (1975) (“a home rule city should be able to adopt an ordinance which would require the demolition or repair of substandard buildings that constitute a hazard to the health, safety, and welfare of the citizens.”)).

22. *Id.*

23. Brief for Cities of San Antonio & Houston as Amici Curiae supporting Petitioner at 9-10, *Stewart*, 361 S.W.3d 562 (Tex. 2012) (No. 09-0257), 2009 WL 3169323; See also Tex. Leg. Online, *History*, <http://www.legis.state.tx.us/billlookup/History.aspx?LegSess=73R&Bill=HB333>.

24. Brief for Cities of San Antonio and Houston as Amici Curiae Supporting Petitioner at 9-10, *Stewart*, 361 S.W.3d 562 (No. 09-0257) (“Currently, court cases can extend indefinitely; this bill would guarantee quicker action. [The amendments] also would clarify the standard of review for administrative cases. City hearings often lose their meaning when a district court judge can completely re-try the case.” (citing House Research Org., Bill Analysis, Tex. H.B. 333, 73d Leg., R.S. at 885-89 (1993))).

25. *Id.*

26. TEX. LOC. GOV’T CODE ANN. § 214.001(a)(1) (West 2008).

## 210 TEXAS WESLEYAN J. OF REAL PROPERTY LAW [Vol. 1

“provide for a public hearing to determine whether a building complies with the standards set out in the ordinance.”<sup>27</sup> Under current legislation, all owners whose building is declared a public nuisance by a city board have the right to appeal the board’s decision to district court for substantial evidence review.<sup>28</sup>

In addition to city building standards commissions, Texas law permits cities to appoint administrative boards to consider ordinance violations and nuisances related to the maintenance and upkeep of real property.<sup>29</sup> Under Texas Local Government Code section 54, ordinances that are subject to quasi-judicial administrative board enforcement include any ordinance “relating to conditions caused by accumulations of refuse, vegetation, or other matter that creates breeding and living places for insects and rodents; or . . . condition, use, or appearance of property.”<sup>30</sup> As a result, most threats to the health and safety of cities that are related to the maintenance of real property can be abated by city-appointed boards.

### C. *The Texas Legislature Delegates Abatement Power to City Officials*

In the Texas Constitution, there is distinct separation of powers, and determining public policy through rulemaking is the Legislature’s power.<sup>31</sup> In his administrative law treatise, Kenneth Davis asserts that “the kind of government we have developed could not operate without allowing legislatures to delegate rulemaking authority to administrative bodies.”<sup>32</sup> The Supreme Court of Texas has further held that the Legislature “may delegate its powers to agencies established to carry out legislative purposes, as long as it establishes ‘reasonable standards to guide the entity to which the powers are delegated.’”<sup>33</sup>

### D. *City Police Power*

An “unconstitutional taking” is described by the Supreme Court of Texas as the taking, damaging, or destruction of another’s property by

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27. *Id.* at § 214.001(b)(3).

28. TEX. LOC. GOV’T CODE ANN. §§ 54.039(f), 214.0012(f).

29. *Stewart*, 361 S.W.3d 564–65 (“Texas law permits municipalities to establish commissions to consider violations of ordinances related to public safety.” (citing Tex. Loc. Gov’t Code §§ 54.032–.041, 214.001–.012)).

30. TEX. LOC. GOV’T CODE ANN. § 54.032(4) – (5) (West 2008).

31. Tex Const. art. III, § 1; *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000) (“In Texas, legislative power is defined broadly. It includes the power to set public policy.”).

32. KENNETH CULP DAVIS, 1 ADMINISTRATIVE LAW TREATISE § 3.1, at 150 (2d ed. 1978) (as cited in *Tex. Boll Weevil Eradication Found. v. Lewellen*, 952 S.W.2d 454, 466 (Tex. 1997)).

33. *R.R. Comm’n. v. Lone Star Gas Co.*, 844 S.W.2d 679, 689 (Tex. 1992) (quoting *State v. Tex. Mun. Power Agency*, 565 S.W.2d 258, 273 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ dismissed)).

the government without just compensation.<sup>34</sup> However, since the 1800s, the United States Supreme Court has held that destruction of property used to maintain a public nuisance is not a taking of property for public use, but rather an exercise of city police power.<sup>35</sup>

Cities have the right to abate public nuisances through their police power, or regulatory power of the State.<sup>36</sup> Police power is defined as “the inherent and plenary power of a sovereign to make all laws necessary . . . to preserve the public security, order, health, morality and justice” and is regarded as a “fundamental power essential to government, and it cannot be surrendered by the legislature or irrevocably transferred away from government.”<sup>37</sup> Public nuisances create a danger to the public’s health and safety in that they create “condition[s] dangerous to health [and] offensive to community moral standards.”<sup>38</sup> Therefore, public nuisances are subject to abatement by municipalities.

The Texas Legislature has given administrative officers the authority to determine whether a property constitutes a public nuisance and the power to abate the nuisance.<sup>39</sup> However, it has also regulated cities’ police power: Determinations of public nuisances must relate to something “having the nature of a public emergency, threatening public calamity, and presenting an imminent and controlling exigency before which, of necessity, all private rights must immediately give way.”<sup>40</sup> Since the right to use property as one chooses is a constitutional right, administrative officers cannot invoke police power to abate a nuisance unless the property owner’s use endangers or threatens the public health or welfare.<sup>41</sup> This has historically kept private property safe from the “uncontrolled will of temporary administrative authorities.”<sup>42</sup>

Landowners may bring inverse condemnation suits against the government when their land has been taken for a government use

34. *City of Dallas v. Jennings*, 142 S.W.3d 310, 313 n.2 (Tex. 2004); see also Tex. Const. Art. I, § 17(d).

35. *Mugler v. Kansas*, 123 U.S. 623, 658–59 (1887) (“The police power, which is exclusively in the States, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority.”).

36. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1022–23 (U.S. 1992) (“government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate — a reality we nowadays acknowledge explicitly with respect to the full scope of the State’s police power.”).

37. BLACK’S LAW DICTIONARY 1196 (8th ed. 2004).

38. *Id.* at 1098.

39. *Stockwell v. State*, 110 Tex. 550, 554 (1920) (“The State, in the exercise of its public power, may denominate certain things to be public nuisances, and because of their having that character provide for their summary abatement.”).

40. *Id.* at 555.

41. *Spann v. Dallas*, 235 S.W. 513, 515 (1921) (“The police power is founded in public necessity, and only public necessity can justify its exercise.”).

42. *Stockwell*, 110 Tex. at 555.



## 212 TEXAS WESLEYAN J. OF REAL PROPERTY LAW [Vol. 1

through the exercise of eminent domain and they have not been compensated.<sup>43</sup> In recent years, the Supreme Court of Texas has noted that the line between the “exercise of police power, which excus[es] compensation, and eminent domain, which require[es] compensation,” has been blurred.<sup>44</sup> The United States Supreme Court, in *Armstrong v. United States*, stated the public policy behind compensation for takings claims: “[T]he Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, *in all fairness and justice, should be borne by the public as a whole.*”<sup>45</sup> The property owner, however, controls the source of the public burden when they own property that is a public nuisance. It is a natural right for individuals to use their property how they choose, unless that use threatens public health or safety.<sup>46</sup>

### E. *The Substantial Evidence Review Standard*

Texas recognizes four types of review for agency decisions.<sup>47</sup> These standards are pure trial de novo, pure substantial evidence, substantial evidence de novo, and a special rate-case classification referred to as de novo fact trial.<sup>48</sup> Texas law has traditionally provided a safeguard for owners of property that an administrative board has determined to be a public nuisance: The owner can appeal the determination to district court, and that decision is reviewable by the judge under the substantial evidence review standard.<sup>49</sup>

Substantial evidence review is usually a much quicker process of review.<sup>50</sup> It places deference on the administrative board’s decision to abate a public nuisance.<sup>51</sup> The Texas Legislature noted that “court cases can extend indefinitely” and that substantial evidence review

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43. BLACK’S LAW DICTIONARY 310 (8th ed. 2004).

44. *Steele v. Houston*, 603 S.W.2d 786, 789 (Tex. 1980) (“Recent decisions by this court have broadly applied the underlying rationale to takings by refusing to differentiate between an exercise of police power, which excused compensation, and eminent domain, which required compensation. That dichotomy, we have held, has not proved helpful in determining when private citizens affected by governmental actions must be compensated.”).

45. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

46. *Spann*, 235 S.W. at 515.

47. 2 Tex. Jur. 3d *Administrative Law* § 198 (2003); *See also*, G.E. Am. Commun. v. Galveston Cent. Appraisal Dist., 979 S.W.2d 761, 764 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

48. *Id.*; G.E. Am. Commun., 979 S.W.2d 761.

49. TEX. LOC. GOV’T CODE ANN. § 54.039(f) (West 2008).

50. Brief for Cities of San Antonio and Houston as Amici Curiae Supporting Petitioner at 9-10, *City of Dallas v. Stewart*, 361 S.W.3d 562 (Tex. 2011) (No. 09-0257) (“Currently, court cases can extend indefinitely; this bill would guarantee quicker action.” (citing House Research Org., Bill Analysis, Tex. H.B. 333, 73d Leg., R.S. at 885-89 (1993))).

51. TEX. LOC. GOV’T CODE ANN. § 2001.174.

standard “guarantee[s] quicker action.”<sup>52</sup> The district court only reviews the factual record made in front of the administrative board under the substantial evidence review standard.<sup>53</sup> Under this standard, it only looks to see if the evidence was sufficient so that reasonable minds could have reached the board’s conclusion.<sup>54</sup>

Substantial evidence review differs from de novo review of an administrative decision, which is nondeferential review of both the administrative hearing record and any new evidence parties wish to introduce in district court.<sup>55</sup> Therefore, any fact-finding or determinations in an administrative hearing are moot if reviewed under the de novo standard, since the reviewing court conducts a brand-new trial.<sup>56</sup>

#### F. *Administrative Boards are Viewed as Best Suited to Determine Public Safety Hazards*

Administrative boards are appointed by cities because they are best qualified to assess violations of city code, and they act as the fact-finders during the public nuisance abatement process.<sup>57</sup> The delegation of statutory authority on administrative agencies and officials “is predicated upon a . . . judgment on the part of the legislature, for the legislature. . . has chosen to entrust a private body with law-making functions in order to take advantage of a body with expertise and ex-

52. Brief for Cities of San Antonio and Houston as Amici Curiae Supporting Petitioner at 9-10, *Stewart*, 361 S.W.3d 562 (No. 09-0257) (“Currently, court cases can extend indefinitely; this bill would guarantee quicker action.” (citing House Research Org., Bill Analysis, Tex. H.B. 333, 73d Leg., R.S. at 885-89 (1993))).

53. *G.E. Am. Comm’n*, 979 S.W.2d at 764 (“Pure substantial evidence review is at the opposite end of the spectrum. Under this standard, the agency’s decision is not automatically vacated. Rather, the reviewing tribunal looks only at the record made before the agency or board and determines whether the agency’s findings are reasonably supported by substantial evidence.”).

54. TEX. LOC. GOV’T CODE ANN. § 2001.174; *Murmur Corp. v. Bd. of Adjustment*, 718 S.W.2d 790, 799 (Tex. App.—Dallas 1986, writ ref’d n.r.e.) (“Murmur satisfies its burden to show that the order is illegal or an abuse of its discretion if it establishes that there is no evidence from which reasonable minds could have reached the conclusion that the board must have reached in order to justify its order.”); *Swain v. Board of Adjustment*, 433 S.W.2d 727, 730 (Tex. Civ. App. Dallas 1968) (“If the evidence before the court, as a whole, is such that reasonable minds could have reached the conclusion that the board must have reached in order to justify its action, then the order must be sustained.”).

55. BLACK’S LAW DICTIONARY 864 (8th ed. 2004).

56. See *A.H.D. Houston, Inc. v. City of Houston*, 316 S.W.3d 212, 217 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (Appellants argued for a de novo review “with a new hearing, presentation of evidence, and fact finding by the trial court.”).

57. *Firemen’s & Policemen’s Civil Serv. Comm’n v. Brinkmeyer*, 662 S.W.2d 953, 956 (Tex. 1984) (“On one hand, the court must hear and consider evidence to determine whether reasonable support for the administrative order exists. On the other hand, the agency itself is the primary fact-finding body, and the question to be determined by the trial court is strictly one of law. Thus, while the reviewing court is to a certain extent a fact-finder, it may not substitute its judgment for that of the agency on controverted issues of fact.”).

## 214 TEXAS WESLEYAN J. OF REAL PROPERTY LAW [Vol. 1

perience in a particular area requiring the exercise of professional judgment and specialized skills.”<sup>58</sup>

Administrative boards are groups of appointed officials that have the credentials and background to make nuisance determinations. For instance, in the City of Abilene, the Board of Building Standards consists of seven appointed members including “an architect, an engineer, a mortgage loan banker, a real estate broker, a building contractor, a home builder, and a social worker.”<sup>59</sup> According to city ordinance, they are all required to have five years of experience in their fields.<sup>60</sup> Administrative boards are not arbitrarily appointed city officials; rather, they are highly skilled and trained professionals that can make public nuisance determinations better than the average lawyer, judge, or jury.

PART III. *CITY OF DALLAS V. STEWART*: THE SUPREME COURT OF TEXAS RULES THAT A PUBLIC NUISANCE DETERMINATION BY AN ADMINISTRATIVE BOARD DOES NOT PRECLUDE A STATE TAKINGS CLAIM.

A. *Background Facts and Procedure*

On July 11, 2011, in a 5-to-4 decision, *City of Dallas v. Stewart* was decided by the Supreme Court of Texas.<sup>61</sup> The *Stewart* opinion stated that administrative boards’ decisions on public nuisances do not preclude a property owner’s takings claim.<sup>62</sup> The facts of the case are as follows:

Heather Stewart abandoned her house in 1991.<sup>63</sup> For the next eleven years, the property was visited by Dallas Code Enforcement Officials for violations of the City’s housing code.<sup>64</sup> Vagrants occasionally stayed in the home.<sup>65</sup> There were no working utilities on the premises for over a decade.<sup>66</sup> The windows were boarded up and the

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58. Shiv Narayan Prasad, *Deconstructing the Bill of Rights in Administrative Adjudication - Enfranchising Constitutional Principles in the Process*, 51 S. TEX. L. REV. 369, 373–74 (2009) (citing *Simon v. Cameron*, 337 F. Supp. 1380, 1383 (C.D. Cal. 1970)) See also Brief for City of Irving as Amicus Curiae supporting Petitioner, *Stewart*, Page 6 (stating “[o]ne compelling reason for allowing substantial evidence review of administrative board decisions is that it gives deference to the administrative agency in its field of expertise.”).

59. Brief for City of Abilene as Amicus Curiae Supporting Petitioner at 6, *Stewart*, 361 S.W.3d 562 (Tex. 2011) (No. 09-0257) (citing City of Abilene Ordinance 8-362).

60. *Id.*

61. *Stewart*, No. 09–02972011, WL 2586882 (Tex. 2011).

62. *Stewart*, 361 S.W.3d at 564, 580–81; see also Brief for the Texas Municipal League and Texas City Attorneys Association as Amici Curiae Supporting Petitioner at 1, *Stewart*, 361 S.W.3d 562 (No. 09-0257).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

property was in disrepair.<sup>67</sup> Fallen trees caused \$8,000 worth of damage to her neighbor's house.<sup>68</sup> The overgrowth on the property threatened to do an estimated \$30,000 more in damage to neighboring properties.<sup>69</sup> Neighbors filed complaints with the City six times over a ten-year period.<sup>70</sup> Stewart was unresponsive to paper notices left on her door.<sup>71</sup> The only documented improvement she made to the property was the installation of a fence.<sup>72</sup>

In September 2001, the Dallas Urban Rehabilitation Standards Board ("URSB") held a hearing to determine if Stewart's home was a public nuisance.<sup>73</sup> During the first hearing regarding Stewart's property, the URSB considered testimony from Stewart's neighbor about the extent of his property damage and also reviewed prior complaints against the property.<sup>74</sup> Stewart was allowed to present evidence, but did not appear at the hearing.<sup>75</sup> At the conclusion of the hearing, the URSB found that the house was a public nuisance.<sup>76</sup>

A year later, the URSB held a hearing on Stewart's motion for re-hearing.<sup>77</sup> Stewart and her mother appeared at this second hearing and contested the allegation that the house was a public nuisance.<sup>78</sup> Stewart admitted that, in a year's time, she had made no serious progress in correcting the code violations.<sup>79</sup> The URSB affirmed the public nuisance determination.<sup>80</sup>

After the second hearing, the URSB sent a city inspector to the property.<sup>81</sup> He verified that no improvements had been made.<sup>82</sup> Since the inspector found no repairs, the City obtained a judicial-demolition warrant.<sup>83</sup> Stewart appealed the URSB's final decision to district court.<sup>84</sup>

Stewart's appeal did not stay the destruction of her house,<sup>85</sup> and on November 1, 2002, it was demolished.<sup>86</sup> Stewart then amended her complaint to include due process and unconstitutional takings claims

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67. *Id.*

68. *Id.* at 564–65.

69. *Id.* at 565.

70. *Id.* at 564.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Stewart*, 361 S.W. 3d 562, 564–65 (Tex. 2012).

75. *Id.* at 582.

76. *Id.* at 565.

77. *Id.*

78. *Id.* at 582.

79. *Id.*; Pet'r's Mot. for Reh'ing, Pg. 2.

80. *Stewart*, 361 S.W. 3d 562, 565 (Tex. 2012).

81. *Id.*

82. *Id.*

83. *Stewart*, 361 S.W.3d at 565.

84. *Id.*

85. *Id.*

86. *Id.*

## 216 TEXAS WESLEYAN J. OF REAL PROPERTY LAW [Vol. 1

against the City.<sup>87</sup> Her appeal was initially reviewed under the substantial evidence review standard pursuant to Texas Local Government Code.<sup>88</sup> The district court affirmed the URSB's findings that Stewart's property was a public nuisance; however, it severed Stewart's unconstitutional takings claim for de novo review by a jury.<sup>89</sup>

In Stewart's new trial, the jury found that her property was not a public nuisance and that the City took her property without just compensation.<sup>90</sup> She was awarded over \$75,000 in damages.<sup>91</sup> The City appealed, claiming that the URSB's public nuisance determination precluded a takings claim under the theory of res judicata.<sup>92</sup>

In a 5-to-4 decision, the Supreme Court of Texas affirmed the trial court's decision to sever the constitutional claim.<sup>93</sup> It further held that an administrative board's determination that a building is a public nuisance, and the affirmance of that determination in trial court on substantial evidence review, is insufficient to protect a property owner's rights against unconstitutional takings.<sup>94</sup>

### B. Motion for Rehearing Denied

On January 27, 2012, the Supreme Court of Texas denied the City of Dallas' Motion for Rehearing.<sup>95</sup> The Court attacked the substantial evidence review standard, the accountability of municipal-level commissions, and the vagueness of the Texas Local Government Code.

#### 1. Substantial Evidence Review Standard Inadequate

The *Stewart* opinion held that an administrative board's nuisance determination, and a trial court's affirmance of that determination under a substantial evidence standard, were not entitled to a preclusive effect in a takings case.<sup>96</sup> It cited *City of Houston v. Lurie*, where it was held that determinations of whether a person's property is a public nuisance must be made by a court.<sup>97</sup> It did not distinguish between public nuisance findings and value determinations in a condemnation proceeding.<sup>98</sup> The Court stated that constitutional fact review

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87. *Id.*

88. *Stewart*, 361 S.W.3d at 562; TEX. LOC. GOV'T CODE ANN. § 214.0012(f) (West 2008). See also TEX. LOC. GOV'T CODE ANN. § 54.039(f) (West 2008).

89. *Stewart*, 361 S.W.3d at 565.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Stewart*, 361 S.W.3d at 562.

94. *Id.* at 566, 578.

95. *Id.* at 562, 564.

96. *Id.* at 566, 578–79.

97. *Id.* at 569, 571.

98. *Id.* at 568–69 (“The City and the dissents urge us to insulate one type of takings claim from the protections of *Steele*: those in which an agency has first declared the property a nuisance. We do not believe, however, that this matter of constitutional right may finally rest with a panel of citizens untrained in constitutional law.”).

2012] TEXAS AFTER *CITY OF DALLAS v. STEWART* 217

is required “[i]n those areas [in which] facts tend to be deeply intertwined with legal issues, necessitating independent review.”<sup>99</sup>

## 2. Accountability of Municipal Boards

The Court also concluded that agencies do not have the power of constitutional construction.<sup>100</sup> The *Stewart* opinion states:

The protection of property rights, central to the functioning of our society, should not—indeed, cannot—be charged to the same people who seek to take those rights away. 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.<sup>101</sup>

The opinion noted that “accountability is especially weak” with regard to “municipal-level agencies such as the URSB.”<sup>102</sup> Its rationale was that administrative boards are created by cities that typically lack separation of powers.<sup>103</sup> The Court blamed the “fragmentation of Texas’ executive branch” and said it “attenuates the accountability of administrative agencies.”<sup>104</sup> The Court went on to note that “[o]ur opinion emphasizes the importance of an individual property owner’s rights when aligned against an agency appointed by a City to represent the City’s interests.”<sup>105</sup> The Court noted that takings claims involve mixed questions of fact and law.<sup>106</sup> It conceded that simple questions such as structural integrity of a building were questions within the competence of the administrative agency, but that applying those facts to legal standards was outside the competence of administrative agencies.<sup>107</sup>

## 3. Vagueness of the Texas Local Government Code

Additionally, the Court scrutinized Texas Local Government Code section 214 as too vague.<sup>108</sup> It cited *City of Texarkana v. Reagan*, which held that “a court must determine whether a building is ‘in fact’ a nuisance.”<sup>109</sup> In *Reagan*, the City of Texarkana had an ordinance that gave the city the power to abate dilapidated buildings without any

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99. *Id.* at 577.

100. *Id.* at 568.

101. *Id.* at 580–81.

102. *Id.* at 573.

103. *Id.*

104. *Id.*

105. *Id.* at 574.

106. *Id.* at 578.

107. *Id.*

108. *Id.* at 570.

109. *Id.*

## 218 TEXAS WESLEYAN J. OF REAL PROPERTY LAW [Vol. 1

other specifications as to what constituted a dilapidated building.<sup>110</sup> The Supreme Court of Texas ruled that the Texas Local Government Code section 214 was similarly vague because it stated that a municipality may, by city ordinance, have the power to demolish structures that are “dilapidated, substandard, or unfit for human habitation and a hazard to the public health, safety, and welfare.”<sup>111</sup> The Court noted that “where the statutory term[s] w[ere] more general, and the agency therefore had discretionary power, review [is] necessary.”<sup>112</sup>

D. *Up roar Over Stewart: The Issue of City Financial Woes During the Recession*

After the first *Stewart* opinion, Texas cities began to worry about the cost associated with de novo review of nuisance determinations.<sup>113</sup> The Texas Municipal League, in their amicus brief to the Supreme Court of Texas, described the financial woes of cities facing litigation for takings claims in an “already fractured economy.”<sup>114</sup> The brief stated that Texas cities have seen a cut of almost “\$154 million of funds . . . for the 2012-2013 biennium” under the new General Appropriations Bill:<sup>115</sup>

The economy’s practical effect is that cities and their taxpayers lack the financial resources to seek a de novo judicial review every time they seek to abate a nuisance. The Court’s holding, combined with the current economic crisis, strips cities of their police powers to abate nuisances. Without the funds to seek de novo reviews of every nuisance, nuisances will multiply unchecked, and society will be at the mercy of individual interests, putting public order and security at peril.<sup>116</sup>

Many city officials thought that the original *Stewart* opinion would have a colossal effect on the financial welfare of Texas municipalities due to the ten year statute of limitations on takings claims;<sup>117</sup> however, in the denial of Dallas’ Motion for Rehearing, the Court made it

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110. *Texarkana v. Reagan*, 112 Tex. 317, 323 (Tex. 1923) (“The ordinance makes final the determination of the City Council on the question as to whether or not the building under investigation is a nuisance. The City was without authority to do, and this ordinance, in so far as it makes final the orders of the City Council declaring the building a nuisance and ordering its summary abatement, is void.”).

111. *Stewart*, 361 S.W. 3d at 570; TEX. LOC. GOV’T CODE ANN. § 214.001(a)(1).

112. *Stewart*, 361 S.W. 3d at 570 n.13.

113. Brief for The Texas Municipal League as Amicus Curiae Supporting Petitioner at 5, *City of Dallas v. Stewart*, 361 S.W.3d 562 (Tex. 2012) (No. 09-0257).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Stewart*, S.W.3d at 579; Brief for the City of Irving as Amicus Curiae Supporting Petitioner at 8–9, *City of Dallas v. Stewart*, 361 S.W.3d 562 (Tex. 2012) (No. 09-0257).

2012] TEXAS AFTER *CITY OF DALLAS* v. *STEWART* 219

clear that cities would still have the ability to exercise police power and would not be subject to a flood of takings claims.<sup>118</sup>

#### PART IV. MUNICIPALITIES ARE NOT STRIPPED OF PUBLIC NUISANCE ABATEMENT POWER

On January 27, 2012, the Supreme Court of Texas denied Dallas' Motion for Rehearing.<sup>119</sup> In its substituted opinion, the Court stated that a property owner only has thirty days to appeal a demolition order of a building.<sup>120</sup> Consequentially, city officials should change their abatement procedures for the demolition of property to reflect the thirty-day window of time the property owner has to appeal a public nuisance abatement order.<sup>121</sup> They should also interpret the *Stewart* decision narrowly to apply only to demolitions, and not regulatory takings.

##### A. *Regulatory Takings are Inherently Different than Physical Takings*

The *Stewart* opinion states that, “[i]n the context of nuisance law, ‘abate’ means to ‘eliminat[e] or nullify[ ]’” and that “[m]unicipalities have, within their police powers, authority to abate nuisances, including the power to do so permanently through demolition.”<sup>122</sup> The Court did not discuss regulatory takings, and it should be interpreted to have only ruled on permanent abatement, or a physical taking of property. Accordingly, the case cannot be treated as precedent for public nuisance abatement cases involving regulatory takings.<sup>123</sup>

The demolition of a house, such as in the *Stewart* case, is a form of a physical taking of property, as it is the total destruction of the prop-

118. *Stewart*, 361 S.W.3d at 578–79.

119. *Id.* at 564.

120. *See id.* at 580 (“property owners rarely invoke the right to appeal. This may be due to the correctness of the nuisance finding, to the time and expense involved, or to the Local Government Code’s narrow thirty day window for seeking review.”) (citing TEX. LOC. GOV’T CODE ANN. § 214.0012(a) (requiring appeals to be filed within thirty days of order)).

121. Scott Houston, *Substandard Structures after City of Dallas v. Stewart* 7 (Feb. 2012), available at [http://www.tml.org/legal\\_pdf/SubstandardBuildingQA.pdf](http://www.tml.org/legal_pdf/SubstandardBuildingQA.pdf) (The Texas Municipal League wrote a memorandum after the Court’s denial of the Petitioner’s Motion for Rehearing which suggests “[m]ost city attorneys will read the Court’s opinions in *Stewart* and *Patel* to collectively mean that a property owner or other aggrieved person must appeal from an administrative decision to demolish a structure within 30 days, and must include in that appeal the takings challenge.”).

122. *Stewart*, 361 S.W.3d at 564 n.1.

123. *See generally* Lowenberg v. City of Dallas, 168 S.W.3d 800, 801-02 (Tex. 2005) (per curiam) (reversed on other grounds) (stating “there are several sharp distinctions between physical takings and regulatory takings. The former ‘are relatively rare, easily identified, and usually represent a greater affront to individual property rights,’ while the latter ‘are ubiquitous and most of them impact property values in some tangential way.’ As a result, it is often inappropriate to treat cases involving one as controlling precedents for the other.”).



## 220 TEXAS WESLEYAN J. OF REAL PROPERTY LAW [Vol. 1

erty. Physical takings are “relatively rare, easily identified, and usually represent a greater affront to individual property rights.”<sup>124</sup> Conversely, a regulatory taking occurs when a regulation imposes a limit on how property can be used and denies the owners “economically viable use of their land.”<sup>125</sup> The *Stewart* opinion does not affect city boards’ power to determine if someone is violating a public nuisance ordinance and to subsequently issue a fine or order. Furthermore, the regulation enforced is not an unconstitutional taking if it 1) does not interfere with distinct investment-backed expectations, 2) does not have a substantial economic impact on the property owner, and 3) targets the community as a whole.<sup>126</sup>

## 1. Investment-Backed Expectations

Loss of anticipated gains or speculation about future profitability do not constitute investment-backed expectations.<sup>127</sup> Rather, courts look to the “existing and permitted use[ ] of property” to determine investment-backed expectations.<sup>128</sup> In *Taub v. City of Deer Park*, a land developer filed an application to rezone seventy acres of his land from single-family residential to multi-family residential.<sup>129</sup> Taub presented evidence to the Deer Park Zoning and Planning Commission that his tract of land could not “be profitably developed for single-family use.”<sup>130</sup> He also provided evidence that there was a demand for multi-family housing in the area.<sup>131</sup> Deer Park city officials, however, testified that multi-family residential units on Taub’s land would cause water and sewage backup in the city.<sup>132</sup> The Zoning and Planning Commission voted unanimously to deny the application.<sup>133</sup>

Taub argued that the City of Deer Park unconstitutionally took his property by refusing to rezone it from single-family to multi-family residential use, thereby denying him his investment-backed expectations.<sup>134</sup> On appeal, the Supreme Court of Texas disagreed.<sup>135</sup> The Court stated that the takings clause “does not charge the government with guaranteeing the profitability of every piece of land subject to its

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124. *Id.* at 801 (citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002)).

125. *Id.*

126. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 670-72 (Tex. 2004).

127. *Taub v. City of Deer Park*, 882 S.W.2d 824, 826 (Tex. 1994); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 936 (Tex. 1998).

128. *Mayhew*, 964 S.W.2d at 936.

129. *Taub*, 882 S.W.2d at 825.

130. *Id.* at 826.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

authority.”<sup>136</sup> The refusal to rezone Taub’s property was not a regulatory taking because it is “not the government’s duty to underwrite the risk” of purchasing and developing real estate.<sup>137</sup>

In *Hallco Texas, Inc. v. McMullen County*, the Supreme Court of Texas again ruled that expectancy of future value of property was not reason enough to deem a city ordinance a regulatory taking.<sup>138</sup> Hallco Texas, Inc. (“Hallco”) bought 128 acres of land that were about two miles away from Choke Canyon Lake in McMullen County.<sup>139</sup> The company intended to build a solid waste disposal facility on the land.<sup>140</sup> However, the McMullen County Commissioner Court heard of Hallco’s plan and passed a city ordinance barring any solid waste disposal within three miles of the lake.<sup>141</sup>

Hallco sued the county, arguing that the ordinance was a regulatory taking since the value of its land with the waste disposal facility would be much greater than the current value of the land.<sup>142</sup> The San Antonio Court of Appeals affirmed the trial court’s decision, stating that “[a] mere expectancy of future services which would render the land more valuable, in the absence of a contract, is not a vested property right for purposes of determining whether a taking has occurred.”<sup>143</sup>

## 2. Substantial Economic Impact

City officials must also consider the economic impact of a city ordinance when determining if it constitutes a regulatory taking. When doing so, they “compare the value that has been taken from the property to the value that remains in the property.”<sup>144</sup> However, the economic impact on citizens will be insubstantial when there are no investment-backed expectations.<sup>145</sup> City boards should continue issuing fines and repair orders for violations of city ordinances when the economic impact is insubstantial.

In *Price v. City of Junction*, the City implemented an ordinance to combat “the junked, wrecked and abandoned vehicles that littered the city.”<sup>146</sup> The regulation allowed city officials to order the removal of any vehicles that were “wrecked, dismantled, partially dismantled or

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136. *Id.*

137. *Id.*

138. *Hallco Tex. v. McMullen County*, 1997 Tex. App. LEXIS 2020 (Tex. App.—San Antonio 1997) (aff’d in *Hallco Tex., Inc. v. McMullen County*, 221 S.W.3d 50, 61-62 (Tex. 2006)) (not designated for publication).

139. *Id.* at \*1–2.

140. *Id.*

141. *Id.*

142. *Id.* at \*5.

143. *Id.* at \*7–8.

144. *Mayhew*, 964 S.W.2d at 935–36.

145. *Price v. City of Junction*, 711 F.2d 582, 591–92 (5th Cir. 1983).

146. *Id.* at 585.

## 222 TEXAS WESLEYAN J. OF REAL PROPERTY LAW [Vol. 1

discarded or . . . inoperable for more than 120 days” from private property.<sup>147</sup> Six citizens sued the City, declaring the junk car ordinance unconstitutional and a regulatory taking of property without just compensation.<sup>148</sup> The district court rejected the constitutional claim and upheld the statute.<sup>149</sup>

On appeal, the plaintiffs argued that an order that requires them to “spend money to make their cars operative” is “confiscatory,” and is therefore a taking of property without just compensation.<sup>150</sup> The appellate court affirmed the district court’s rejection of the takings claim.<sup>151</sup> It noted that the ordinance only required the plaintiffs “to license or hide their inoperable junk vehicles if they do not want them to be seized.”<sup>152</sup> Since the cars were inoperable, the court held they “do not embody reasonable, investment-backed expectations” and “the economic impact on the plaintiffs was insufficient to render the ordinance improper under the takings clause.”<sup>153</sup>

In *Basse Truck Line v. Texas Natural Resource Conservation Commission*, the Austin Court of Appeals held that orders for repairs and fines for violations of health and safety code were not regulatory takings since they did not deprive a business of all economically viable use of its property.<sup>154</sup> The facts of the case are as follows:

Basse Truck Line owned a gas and trucking service station in San Antonio.<sup>155</sup> Portions of the property on which Basse’s service station was built were unpaved.<sup>156</sup> When trucks drove on the unpaved portions, large amounts of dust would rise into the air.<sup>157</sup> A neighbor complained about the dust to the Texas Natural Resources Conservation Commission (“TNRCC”).<sup>158</sup> The TNRCC found that Basse violated the Texas Health and Safety Code by “allowing the discharge of dust in a concentration and duration adversely affecting humans, animals, plants, or property.”<sup>159</sup> The TNRCC issued an order for Basse to surface the unpaved portions of its facility’s parking lot and fined it an administrative penalty of \$2,500.<sup>160</sup>

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147. *Id.* at 585–87.

148. *Id.* at 585, 591.

149. *Id.* at 592.

150. *Id.* at 591–92.

151. *Id.* at 591.

152. *Id.*

153. *Id.*

154. *Basse Truck Line, Inc. v. Tex. Natural Res. Conservation Comm’n*, NO. 03-02-00272-CV, 2003 Tex. App. LEXIS 5941, at \*22–23 (Tex. App.—Austin July 11, 2003, pet. denied).

155. *Id.* at \*2–\*3.

156. *Id.* at \*3.

157. *Id.*

158. *Id.*

159. *Basse*, 2003 LEXIS 5941, at \*4; TEX. HEALTH & SAFETY CODE ANN. § 382.085(a), (b) (West 2010).

160. *Basse*, 2003 Tex. App. LEXIS 5941, at \*4–5.

Basse appealed the TNRCC's order, asserting that the TNRCC's order and fine constituted a regulatory taking.<sup>161</sup> The district court affirmed the TNRCC's order.<sup>162</sup> It mandated that Basse comply with the TNRCC's order to pave the property and awarded \$20,600 in civil penalties and \$14,200 in attorneys' fees to TNRCC.<sup>163</sup>

Basse then appealed the district court's findings and argued that, since surfacing its facility exceeded the value of the property, the order and fine issued by TNRCC was an unconstitutional taking.<sup>164</sup> Basse argued that "the TNRCC has, for the benefit of a group of private citizens, *regulated* its property to such an extent that the regulation was *tantamount* to a physical taking."<sup>165</sup> The Court of Appeals disagreed and affirmed the administrative agency's decision and the district court's ruling.<sup>166</sup> It noted that a property owner, when deprived of "all economically productive or beneficial use of his land," may then only assert a claim for regulatory taking.<sup>167</sup> Since Basse conceded that he could still use the property as a trucking yard despite the resurfacing, the appellate court held the fine and order was not a regulatory taking of property.<sup>168</sup>

The ruling in *Basse* indicates that an administrative board's fine assessment or order must invalidate a property's use to be considered a regulatory taking. Ordering a parking lot to be paved to abate a nuisance is a remedial action that did not deny the property of any viable usage.<sup>169</sup>

### 3. Targets the Community as a Whole

The nature of the governmental action is the third factor that a court must weigh when determining if enforcement of a city ordinance constitutes a regulatory taking. A city ordinance must target the community as a whole, or else it may be considered an unconstitutional taking.

In *Adams v. City of Weslaco*, South Texas Wastewater contracted with numerous businesses in Weslaco, Texas to clean grease traps and dispose of grease for restaurants.<sup>170</sup> However in 2005, the City of Weslaco passed a city ordinance that awarded an exclusive franchise to Liquid Environmental Solutions of Texas for all grease disposal ser-

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161. *Id.* at \*6.

162. *Id.*

163. *Id.* at \*6–\*7

164. *Id.* at \*7.

165. *Id.* at \*22.

166. *Id.* at \*23.

167. *Id.* at \*22.

168. *Id.* at \*22–\*23.

169. See Scott D. Deatherage, *Annual Survey of Texas Law: Environmental Law*, 57 SMU L. REV. 959, 971 (2004).

170. *Adams v. City of Weslaco*, 2009 Tex. App. LEXIS 2809, \*2 (Tex. App.—Corpus Christi 2009).

## 224 TEXAS WESLEYAN J. OF REAL PROPERTY LAW [Vol. 1

vices.<sup>171</sup> Several restaurants wrote to the city, claiming that they had a valid contract with South Texas Wastewater and wished to continue using the company.<sup>172</sup> The City cited civil and criminal penalties for any company that used a disposal service not franchised by the city for the collection and disposal of grease, thus forcing all the restaurants to use Liquid Environmental Solutions.<sup>173</sup>

South Texas Wastewater filed suit against the City of Weslaco and Liquid Environmental Solutions.<sup>174</sup> Among its claims, it said that the passage and enforcement of Weslaco's ordinance was an unlawful taking.<sup>175</sup> The trial court granted summary judgment in favor of the City, and South Texas Wastewater appealed.

The Corpus Christi Court of Appeals found that Weslaco's city ordinance effectively shut down South Texas Wastewater's business in violation of state statute and the Texas Constitution.<sup>176</sup> In its decision, the court noted that "the legislature's adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" <sup>177</sup> A city ordinance must target the community as a whole, or else it may be considered an unconstitutional taking.

B. *Property Owners must Appeal Demolitions Within Thirty Days of the Abatement Order*

As discussed above, the *Stewart* decision did not address regulatory takings and enforcement of a municipal ordinance is not an unconstitutional regulatory taking unless it denies property of economically viable use. Nonetheless, many city officials worried that the *Stewart* decision would result in financial crisis for Texas cities.<sup>178</sup> In the words of Justice Guzman, "the Court's decision opens the door to a host of takings challenges to agency determinations of every sort."<sup>179</sup> For example, in San Antonio and Houston over the last ten years,

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171. *Id.*

172. *Id.* at \*7.

173. *Id.* at \*2.

174. *Id.*

175. *Id.* at \*28; \*39.

176. *Id.* at \*41–42.

177. *Id.*

178. *Charles Richards*, Texas Supreme Court ruling clears way for demolitions of substandard structures to resume in Paris, other Texas cities, *EPARIS.COM EXTRA!*, (Feb. 2, 2012), <http://www.eparisextra.com/paris-texas-news/2012/02/02/texas-supreme-court-ruling-clears-way-for-demolitions-of-substandard-structures-to-resume-in-paris-other-texas-cities/> (Citing Dallas City Attorney, Tom Perkins, stating "Cities are very, very pleased with this decision in the sense that there is certainty about this situation now. You can't go back and collaterally attack takings for long-concluded cases. Cities were concerned about that.").

179. *City of Dallas v. Stewart*, 2011 Tex. LEXIS 517, \*100-01 (Tex. 2011) (Guzman, J., dissenting).

there were 5,000 demolished structures that were deemed public nuisances by the two cities.<sup>180</sup> San Antonio projected that “millions of taxpayer dollars” could be spent in defending these claims in court.<sup>181</sup>

In its Denial of the City’s Motion for Rehearing, the Supreme Court of Texas responded to the amici’s worries about a ten-year statute of limitations on unconstitutional takings claims.<sup>182</sup> It held that any party who asserts a takings claim must exhaust all administrative remedies first.<sup>183</sup> The Court also stated that, for building demolitions, the owner must timely appeal within thirty days of when a city board’s demolition order is issued.<sup>184</sup> Additionally, any unsuccessful appellant must pay the municipality’s attorney’s fees and costs.<sup>185</sup>

### 1. Administrative Remedies must be Exhausted

All administrative remedies must be exhausted before a property owner can bring a constitutional takings suit.<sup>186</sup> In *City of Dallas v. VSC*, the Dallas Police Department confiscated 270 vehicles from VSC, a licensed vehicle storage facility.<sup>187</sup> Some of the vehicles seized by police displayed the “indicia of theft.”<sup>188</sup> After the confiscation, VSC sued the City, asserting a lien for fees it was owed for the vehicles’ storage.<sup>189</sup> It argued that the City’s actions resulted in an unconstitutional physical taking.<sup>190</sup>

The City of Dallas had a procedure in place to address situations in which a police officer may not always know the identity of persons with a claim to possession of stolen property.<sup>191</sup> Chapter 47 of the Texas Code of Criminal Procedure provides that a person with a property interest may assert that interest directly with a municipal court or district court in a Chapter 47 hearing.<sup>192</sup> The Supreme Court of Texas held that the VSC had knowledge of the vehicles’ seizures, and was therefore required to pursue Chapter 47 proceedings before a takings suit could be initiated.<sup>193</sup> Since VSC did not exhaust all remedies available, the takings suit was dismissed.<sup>194</sup>

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180. Brief for Cities of San Antonio and Houston as Amici Curiae Supporting Petitioner at 13, 361 S.W.3d 562 (Tex. 2012) (No. 09-0257).

181. *Id.* at 13–14.

182. *Stewart*, 361 S.W.3d at 579-80; Richards, *supra* note 179.

183. *Stewart*, 361 S.W.3d at 579.

184. Richards, *supra* note 179, at para. 4.

185. *Id.*

186. *City of Dallas v. VSC, LLC*, 347 S.W.3d 231, 236 (Tex. 2011).

187. *Id.* at 233–35.

188. *Id.* at 234.

189. *Id.*

190. *Id.*

191. *Id.* at 235.

192. *Id.* at 235 n.7.

193. *Id.* at 235–36.

194. *Id.* at 240.

## 226 TEXAS WESLEYAN J. OF REAL PROPERTY LAW [Vol. 1

Likewise, Texas cities' municipal boards are required to notify property owners if their property is considered a public nuisance.<sup>195</sup> Once a property owner is aware their property is considered a public nuisance, he must exhaust all administrative remedies first before appealing a takings claim to district court.<sup>196</sup>

## 2. Time Limit to Appeal Begins Immediately Following a Board's Decision

The time limit to appeal begins immediately after an order is issued by an administrative board.<sup>197</sup> In *Texas Commission on Environmental Quality v. Kelsoe*, Edwin Kelsoe applied for a solid-waste landfill permit.<sup>198</sup> The Texas Commission on Environmental Quality ("TCEQ") denied his application on December 9, 2005.<sup>199</sup> Kelsoe then filed a motion with the TCEQ to overturn its decision, and that motion was denied on January 23, 2006.<sup>200</sup> Finally, on March 2, 2006, Kelsoe appealed the TCEQ's decision for judicial review.<sup>201</sup>

Kelsoe argued that his appeal was timely filed because it was filed within thirty days of the date on which TCEQ denied his application a second time.<sup>202</sup> The Austin Court of Appeals disagreed and held that the deadline for filing his petition for judicial review was January 9, 2006, thirty days after his *original* denial was returned.<sup>203</sup> Kelsoe's motion filed with the TCEQ board did not extend the time to seek judicial review.<sup>204</sup>

Cases such as *Texas Commission on Environmental Quality v. Kelsoe* suggest that the time frame to appeal administrative determinations begins on the day that the order is issued. Additionally, the Supreme Court of Texas ruled in *Patel v. City of Everman* that collateral estoppel does preclude a takings claim and that "a failure to assert a constitutional claim on appeal from an administrative determination precludes a party from raising the issue in another proceeding."<sup>205</sup>

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195. See TEX. LOC. GOV'T CODE ANN. § 214.001(d);(e).

196. *Stewart*, 361 S.W.3d at 579.

197. See *Tex. Comm'n on Envtl. Quality v. Kelsoe*, 286 S.W.3d 91, 96-97; see *Stewart*, 361 S.W.3d 562, 580 (Tex. 2012); Scott Houston, SUBSTANDARD STRUCTURES AFTER CITY OF DALLAS V. STEWART 6 (Feb. 2012), available at [http://www.tml.org/legal\\_pdf/SubstandardBuildingQA.pdf](http://www.tml.org/legal_pdf/SubstandardBuildingQA.pdf) (stating "[i]t appears that, pursuant to the Stewart opinion and another opinion . . . issued on the same day, an appeal from the decision of the municipal body—including a takings claim as Stewart made—must be raised by a property owner within 30 days of certain city actions.").

198. *Kelsoe*, 286 S.W.3d at 93.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 96.

204. *Id.*

205. *Patel v. City of Everman*, 361 S.W.3d 600 (Tex. 2012).

At first glance, it is difficult to reconcile these cases with the *Stewart* opinion because the URSB determined that Stewart's home was a public nuisance in September 2001, reaffirmed its decision in September 2002, and had the house demolished on November 1, 2002.<sup>206</sup> Therefore, it seems as though Stewart did not appeal her takings claim within the statutorily prescribed thirty days. However, Stewart did timely appeal.<sup>207</sup> The opinion states that the URSB sent out an investigator to the property to take photographs on October 17, 2002, which is indicative of an ongoing investigation.<sup>208</sup> Furthermore, the URSB did not conclude their findings and the City did not obtain a judicial demolition warrant until October 28, 2002.<sup>209</sup> Under Texas Local Government Code section 214.0012(a), "[t]he petition [for a takings claim] must be filed by an owner. . . within 30 calendar days after the respective dates a copy of the *final* decision of the municipality is personally delivered or mailed to them [ ]."<sup>210</sup>

In the wake of *City of Dallas v. Stewart*, city officials should change their abatement procedures to reflect the appeal time frame set out in the Texas Local Government Code section 214.0012(a).<sup>211</sup> Many cities are implementing a mandatory thirty-day delay between the issuance of a final order to demolish and the actual demolition.<sup>212</sup>

### C. A Very Small Amount of Public Nuisance Determinations are Appealed

Public nuisance hearings are held on many aspects related to the maintenance of real property such as debris removal, waste disposal, removal of junk cars, and cutting down overgrown vegetation.<sup>213</sup> All

206. *Stewart*, 361 S.W.3d at 564–65.

207. John Council, *Texas Supreme Court rules in case involving takings, nuisance, separation of powers*, Tex Parte Blog, [http://texaslawyer.typepad.com/texas\\_lawyer\\_blog/2012/01/texas-supreme-court-rules-in-case-involving-takings-nuisance-separation-of-powers.html](http://texaslawyer.typepad.com/texas_lawyer_blog/2012/01/texas-supreme-court-rules-in-case-involving-takings-nuisance-separation-of-powers.html) ("The majority opinion was tweaked to make it clear that to protect your constitutional rights you need to file a direct appeal of the city board's decision within the deadline. And it does not change the result to Ms. Stewart, because she did meet the deadline, says Chris Bowers, an assistant Dallas city attorney who represents the city in the case.")

208. *Id.*

209. *Stewart*, 361 S.W.3d at 565.

210. Houston, *supra* note 198; TEX. LOC. GOV'T CODE ANN. § 214.0012(a) (emphasis added).

211. Richards, *supra* note 179, at para. 4; *See also* TEX. LOC. GOV'T CODE § 214.0012(a).

212. Building and Standards Commission, CITY OF THE COLONY, [http://www.ci.the-colony.tx.us/boards/boa/Documents/BSC\\_packet.pdf](http://www.ci.the-colony.tx.us/boards/boa/Documents/BSC_packet.pdf), pg. 1; Request for City Council Agenda Item, LAPORTE CITY COUNCIL, <http://publicrecords.laportetx.gov/WebLink8/DocView.aspx?id=22526&page=18&&dbid=0>; Minutes of the Regular Meeting, RIVER OAKS CITY COUNCIL, [http://www.riveroakstx.com/doc/council\\_mins\\_02142012.pdf](http://www.riveroakstx.com/doc/council_mins_02142012.pdf), pg. 6.

213. Houston v. Johnny Frank's Auto Parts, 480 S.W.2d 774, 780 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.) (describing automotive wrecking and salvage yards as public nuisances). Fort Worth v. Johnson, 388 S.W.2d 400, 402 (Tex.



## 228 TEXAS WESLEYAN J. OF REAL PROPERTY LAW [Vol. 1

public nuisances, regardless of type, are issues that cities wish to swiftly terminate.<sup>214</sup> Even the Majority in *Stewart* concedes that cities need to exercise their police power to “abate nuisances to avoid disease and deter crime.”<sup>215</sup>

In its denial of Dallas’ Motion for Rehearing, the Supreme Court of Texas noted that a small percentage of nuisance determinations by administrative boards are appealed. It stated that property owners “rarely invoke the right to appeal” which “may be due to the correctness of the nuisance finding, to the time and expense involved, or to the Local Government Code’s narrow thirty-day window for seeking review.”<sup>216</sup> Specifically regarding the demolition of substandard buildings, the Court noted the following:

The amici have provided some anecdotal evidence on this point. 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. The one remaining property is apparently the only one in which the owner appealed the case to district court, and that appeal has been dismissed for want of prosecution.<sup>217</sup>

Those property owners who bring frivolous claims against cities for public nuisance abatement will be subject to steep fines: The Supreme Court of Texas has ruled that property owner’s costs include civil penalties.<sup>218</sup> In cities such as Paris, Texas, this can amount to \$1,000 a day.<sup>219</sup> In most cases of public nuisance abatement, it would be advantageous for the property owner to accept a sound determination of public nuisance made by a city.

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1964) (describing a zoning ordinance that is not arbitrary or unreasonable); *San Antonio v. Pollock*, 284 S.W.3d 809, 812 (Tex. 2009) (regarding municipal waste disposal site); *Watts v. State*, 56 S.W.3d 694, 698 (Tex. App.—Houston [14th Dist.] 2001) (rev’d on other grounds) (regarding sewage, trash, and junk as public nuisances); TEX. LOC. GOV’T CODE § 54.032(4).

214. TEX. LOC. GOV’T CODE ANN. § 214.001(a)(1)(stating that a municipality may, by ordinance, require the vacation, relocation of occupants, securing, repair, removal, 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 ANN. § 54.032 (stating that ordinances are subject to quasi-judicial enforcement for the preservation of public safety.); House Research Org., Daily Floor Report, Bill Analysis, Tex. H.B. 333, 7d Leg., R.S. (1993).

215. *Stewart*, 361 S.W.3d at 564.

216. *Id.* at 580.

217. *Id.* at 580 n.28.

218. *Richards*, *supra* note 179, at para. 9.

219. *Id.*

V. CONCLUSION: PUBLIC NUISANCES, NOT CITY POLICE  
POWER, WILL BE ABATED

Only four years ago, the Supreme Court of Texas stated in *Igal v. Brightstar Information Technology Group* that “public policy discourag[es] prolonged and piecemeal litigation” and that “the administrative orders of certain administrative agencies bar the same claims being re-litigated in the court system.”<sup>220</sup> It follows that the *Stewart* opinion came as a shock to city officials. The opinion, at first, was unclear and failed to advise city officials of the extent of their police powers. Justice Guzman’s dissent in the original opinion noted its potential ripple effect:

The Court’s decision opens the door to a host of takings challenges to agency determinations of every sort, and in every such challenge a right to trial de novo will be claimed.<sup>221</sup>

In 2011, twelve amici briefs were filed with the Supreme Court of Texas, including the cities of Fort Worth, Irving, San Antonio, Abilene, Sulphur Springs, McAllen, Aledo, Mesquite, Garland, and Grapevine.<sup>222</sup> All of these briefs asked the Court for a rehearing and clarification of its decision.<sup>223</sup> However, on January 27, 2012, the City of Dallas’s Motion for Rehearing was denied.<sup>224</sup>

The Court did, however, provide the amici with some clarification in its denial. It stated that the cities would not be subject to state takings claims from the past ten years because “[a] party cannot attack collaterally what [it] chooses not to challenge directly.”<sup>225</sup> Nevertheless, some cities are now at a standstill when it comes to abating public nuisances.<sup>226</sup> In Justice Guzman’s dissent, she notes that the Court’s holding had a “debilitating effect” on Texas cities, and in the “mere six months since it was handed down. . . many cities have brought their substandard structure and nuisance enforcement procedures to a stand-still.”<sup>227</sup>

City officials should continue to issue orders and fine property owners who violate city ordinances, since the *Stewart* opinion only addresses demolitions. Furthermore, enforcing ordinances will not be considered a regulatory taking so long as it does not interfere with investment-backed expectations, does not have a substantial economic

220. *Igal v. Brightstar Info. Tech. Group, Inc.*, 250 S.W.3d 78, 86 (Tex. 2007).

221. *Stewart*, 2011 Tex. LEXIS 517, at \*101-02.

222. *Stewart*, 361 S.W.3d at 579.

223. *Id.*

224. *Id.* at 581.

225. *Id.* at 580.

226. See Val Perkins, The Houston Lawyer, *Legal Trends: The Texas Supreme Court’s Emphasis on Private Property Rights Continues*, May/June, 2012, 49 Houston Lawyer 42 (Stating “[t]his case is causing many Texas cities to tread carefully in making nuisance or substandard building determinations.”)

227. *Stewart*, 361 S.W.3d at 599.

230 TEXAS WESLEYAN J. OF REAL PROPERTY LAW [Vol. 1

impact on the property owner, and targets the community as a whole.<sup>228</sup> Admittedly so, enforcing nuisance regulation through orders and fines may not always deter property owners from threatening the health and safety of Texas communities. Cities will also need to stop public nuisances by demolition, or actual physical abatement. In these cases, city boards should continue to abate public nuisances in the same manner as before the *Stewart* opinion, but add a thirty-day wait period in-between the abatement order and the actual demolition or destruction.<sup>229</sup>

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228. *Penn Cent. Transp. Co.*, 438 U.S. 104, 124 (1978); *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 671–72 (Tex. 2004).

229. *Kelsoe*, 286 S.W.3d at 96-97; *Stewart*, 2012 Tex. LEXIS 113, at \*50-51; *See also* *Houston*, *supra* note 198.