

City of Dallas v. Stewart

Divided Supreme Court of Texas Holds that Nuisance Decisions Should Be Made by Courts Rather than City Boards

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In *City of Dallas v. Stewart*, No. 09-0257 (Tex. July 1, 2011), the Supreme Court of Texas (Court) held in a 5-4 decision that an appointed city board's determination that a building is a public nuisance should not be given deference by a court, but should be reviewed *de novo* ("from the beginning"). The opinion may mean that appointed city officials may no longer make substandard building and other nuisance determinations.

In the case, a person abandoned a house. The house fell into disrepair, had been inhabited by vagrants, and suffered from numerous code enforcement violations. The city building standards board determined that the house was an urban nuisance and ordered its demolition. Before the demolition, the owner appealed the board's decision to the trial court. (The appeal did not stay the demolition, and the house was demolished.)

After the demolition, the owner added due process and taking claims to her suit. The trial court judge affirmed the board's decision to demolish. However, a jury decided that the home was not a public nuisance and awarded the owner damages for the demolition of her home. The city appealed the trial court's decision on the issue of whether the board's decision that the house was a public nuisance precluded a finding of a taking.

Local Government Code Chapter 214 defines a building as a nuisance if it is "dilapidated, substandard, or unfit for human habitation." Local Government Code Chapter 54 authorizes a city to create a board to determine violations of public safety ordinances like those in Chapter 214. Pursuant to Chapter 214, a property owner is entitled to notice and a hearing before the board on the issue of demolition, and is given a limited appeal of a decision to a trial court. That statutory appeal is based on deference to the board's decision under what is known as the "substantial evidence" standard of review. See TEX. LOC. GOV'T CODE §§ 54.039(f); 214.0012(f)(authorizing substantial evidence review of standards boards' decisions). Moreover, some board or agency determinations are given a preclusive effect in subsequent litigation. See, e.g., *Igal v. Brightstar Info. Tech. Grp., Inc.*, 250 S.W.3d 78 (Tex. 2007). In this case, however, the Court reached the opposite conclusion based on the "takings" clause in the Texas Constitution.

That clause provides that the government may not take a person's property without just compensation. TEX. CONST. art. I, § 17(d). The use of eminent domain is the most common form of taking. Eminent domain contests are entitled to *de novo* review by a trial court after the board (i.e., the special commissioners) makes a decision. TEX. PROP. CODE § 21.018. Another form of taking is an "inverse condemnation." Inverse condemnation occurs when a government

regulation deprives an owner of the use of his property. *City of Houston v. Trail Enters., Inc.*, 300 S.W.3d 736 (Tex. 2009).

All takings claims are limited by the rule that the abatement of a public nuisance is not a taking. See *City of Texarkana v. Reagan*, 247 S.W. 816, 817 (Tex. 1923). However, according to the Court a nuisance determination must be made by a court rather than an appointed administrative body. See *City of Houston v. Lurie*, 224 S.W.2d 871 (Tex.1949); *City of Texarkana v. Reagan*, 247 S.W. 816 (Tex.1923); *Crossman v. City of Galveseton*, 247 S.W. 810 (Tex.1923); *Stockwell v. State*, 221 S.W. 932 (Tex.1920). In *City of Houston v. Lurie*, the Court held that “[i]t has been repeatedly held that the question of whether property is a public nuisance and may be condemned as such is a justiciable question to be determined by a court.” *Lurie*, 224 S.W.2d at 874.

The Court also stated that *Freeman v. City of Dallas*, 242 F.3d 642 (5th Cir. 2001) was not applicable to the present case. In *Freeman*, the federal Fifth Circuit Court of Appeals held that a city need not seek a search warrant before demolishing a building because such a seizure would be reasonable under the Fourth Amendment to the U.S. Constitution if all the city’s ordinances and the state statutes are followed. *Id.* at 654. But the Court held that the issue in *Freeman* was not whether an administrative city board’s decision should be given deference by a court. Rather, the Court held that *Freeman* examined only the narrower issue of whether the city had to get a warrant to satisfy due process before permanently abating a nuisance.

The Court ultimately held that a city board’s decision that a piece of property is a “nuisance” should not be given deference, but should be reviewed *de novo* by a court similar to condemnation and inverse condemnation takings cases. The Court stated:

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*.

In other words, the judicial determination is required because the nuisance determination is really a determination that destroying the property is not a taking because – as a “nuisance” – the property has no value at all.

Four justices dissented to Chief Justice Jefferson’s majority opinion. Those four justices joined in two dissenting opinions by Justices Johnson and Guzman. Justice Johnson argued that the statutory provisions allowing a board to make a nuisance determination were a significant enough safeguard to warrant giving deference to the board’s decision. (In his dissent, he details the statutory procedure that protects the property owner’s rights in a nuisance case.) Justice Guzman argued that due process is sufficient under the current statutory scheme and also makes policy arguments regarding a city’s need to be able to make nuisance determinations under the statutory procedures.

Multiple cities and the attorney general filed briefs in support of the City of Dallas, to no avail. The City of Dallas has indicated that it will seek a rehearing, and the League will provide amicus support in that effort.

Until the rehearing is decided, many cities have brought their substandard structure and other nuisance ordinance enforcement to a halt. And many city attorneys have asked the Texas Municipal League for guidance. At this point, there is little guidance to provide. Perhaps the safest course of action, which is completely impractical, would be to have an elected judge bless every nuisance action that could be considered a taking. In any case, the League will monitor and participate in the rehearing process. If that process results in a favorable opinion, the issue may once again be settled. If not, the issue will certainly go through the League's legislative police development process, and may even require a constitutional amendment to fix.