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Supreme Court of Texas.
City of Dallas, Petitioner,
v.
Heather Stewart, Respondent.
No. 09-0257.
February 16, 2010.

Oral Argument

Appearances:Barbara E. Rosenberg, Office of the Dallas City Attorney, Dallas, TX, for petitioner.

Julius S. Staev, Law Offices of Julius S. Staev, Dallas, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Harriet O'Neill, Justice Dale Wainwright, Justice David M. Medina, Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett, Justice Eva Guzman.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument now in 09-0257, City of Dallas vs. Heather Stewart.

MARSHALL: May it please the Court, Ms. Rosenberg will present argument for the Petitioner. The Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF BARBARA E. ROSENBERG ON BEHALF OF THE PETITIONER

ATTORNEY BARBARA E. ROSENBERG: May it please the Court. I have divided my argument into two sections. I plan to discuss why the final affirmed decision of the City's Board involves the same claim and the same nuisance issue as the subsequent taking claim for purposes of res judicata and collateral estoppel, and second, I want to talk about why the preclusiveness of the Board decision is consistent with this Court's jurisprudence in giving preclusive effect to administrative decisions; that is, that the City's Board had jurisdiction to make the nuisance determination and acted in a judicial capacity. First, the appellate court

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was just wrong in holding that a board's demolition order that was executed 39 days later did not involve the same issues and claims as the subsequent taking claim. The court was legally and factually wrong. All property is held subject to a valid exercise of police powers and its valid exercise of police powers to protect the public from health and safety hazards means that the government can destroy property to abate a public nuisance and the government is not required to compensate for a loss due to a proper and reasonable exercise of this police power. The URSB, with this subsequent judicial review, determined whether it was a proper for the City to exercise its police power and abate the nuisance which was Stewart's structure. In fact, the URSB procedure is to determine the City's right to take the structure by demolition. Here the City had an affirmed order finding a nuisance and ordering the demolition. The City acted on that order. The City cannot be legally abating a nuisance, which is a taking that's not compensable, and at the same time that same abatement be subject to a taking that is compensable. It's the very same claim, the very same taking, the very same act.

JUSTICE PHIL JOHNSON: Counsel, would you clarify something? In the briefs it was not exactly clear to me the timeline on the magistrate's warrant that permitted them to go forward. There was a hearing at some point. Was that at the same time the district court case was pending?

ATTORNEY BARBARA E. ROSENBERG: Yes, it was. What happened, and it's not in the record, she filed her appeal on October 24th. We had been in the process and given the notice of the demolition on September 26th, and we had gone forward with the inspections. The City actually did not have notice of the pending appeal until November 4th. That's not in the record. But on November 1st, after the magistrate had seen the affidavit, that there hadn't been any repairs, on October 17th, then the warrant was issued on the 28th, and then it was demolished the four days, three or four days later, on November 1st.

JUSTICE PHIL JOHNSON: So now, did she have notice of the hearing before the magistrate?

ATTORNEY BARBARA E. ROSENBERG: No, that is an ex parte done -- that is a warrant kind of proceeding.

JUSTICE PHIL JOHNSON: That's part of the process?

ATTORNEY BARBARA E. ROSENBERG: It was part of the process that was done at the time, because there were issues at the time pending before the federal courts, that whether you needed to have a warrant to do the taking. And then since then, the federal courts have said that it isn't a Fourth Amendment, where you need to have a warrant to be able to demolish the structure. The order is enough, the URSB hearing. The fact is that under the statutes and that there isn't, and when you file the appeal, there isn't an abatement or a holding off of the demolition. She had -- pardon me.

JUSTICE DALE WAINWRIGHT: So, Counsel, it sounds like the City received notice of Stewart's appeal three days after the building was demolished?

ATTORNEY BARBARA E. ROSENBERG: That's correct.

JUSTICE DALE WAINWRIGHT: If the City had received that notice before the building was demolished, would the City have proceeded with the demolition?

ATTORNEY BARBARA E. ROSENBERG: Well, from what I am told -- there's nothing in the record, of course, about this -- but it would depend on the nature and the danger, how dangerous the structure was, what kind of. Sometimes I've been told they would proceed if they hadn't come in and gotten a -- she had the opportunity to get a TRO or a temporary injunction. If the district court had failed to give that, then a writ of injunction from the court of appeals, at which, if given --

JUSTICE DALE WAINWRIGHT: Well, of course, a court order of some type would have precluded the City from doing something in violation of the order.

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ATTORNEY BARBARA E. ROSENBERG: Exactly.

JUSTICE DALE WAINWRIGHT: But assuming there's no Court order, it sounds like you're saying, even though the statute does not, the statute explicitly says the appeal doesn't abate the demolition, it sounds like you're saying that the City would act with discretion as to whether to proceed with the demolition after receiving a notice of appeal, depending on how dangerous it views the public nuisance?

ATTORNEY BARBARA E. ROSENBERG: Yes, and I guess in how we evaluated what the substantial review or whether the procedures had been followed. We would look at the case below and make a decision based on that.

JUSTICE DAVID M. MEDINA: What do you take of Justice Morris's writing that the City had to establish that the property was a nuisance on the day that it was destroyed as opposed to some year earlier?

ATTORNEY BARBARA E. ROSENBERG: Well, I think that is just not correct. The fact is that in 2001, in September of 2001, the Board found that it was a nuisance. When she got notice of that it was going to be demolished, she did a rehearing. In September of 2002, there was another hearing in which she testified about this nuisance. They asked her whether or not she had made any repairs, and she said, no, there had not been any substantial repair. They had just done a fence and plugged one hole, so the rehearing was denied. So that was actually in September 24th of 2002. That is the same nuisance, the same nuisance. So factually it was the same, the exact same condition of the property that carried through until 39 days later when it was actually demolished. The court just didn't look at those facts that made it factually the same. But I think it has to be the same, because if that were if that statement were true, then it wouldn't matter whether it was the URSB deciding it or a district court. If it mattered when the property was demolished, no decision, no judicial determination prior to the demolition would have any effect whatsoever.

JUSTICE EVA GUZMAN: So you would presume that the property was in the same condition absent evidence to the contrary then?

ATTORNEY BARBARA E. ROSENBERG: Well, it was in this case, but what I'm saying is that when a court or when the URSB or a commission holds that there is a nuisance, and by the time they get to the demolition order, there's been many opportunities to repair. So the demolition order --

JUSTICE DAVID M. MEDINA: What's a property owner to do in that situation? You said there are plenty of opportunities to repair.

ATTORNEY BARBARA E. ROSENBERG: Yes.

JUSTICE DAVID M. MEDINA: Once a decision has been made, is the property owner to do nothing because the Board has already declared that this property is a nuisance and is going to be destroyed, but doesn't get around to it for whatever reason, for six months, a year, two years later, what do they do?

ATTORNEY BARBARA E. ROSENBERG: Well, I think that when you look at what that demolition order means or when the nuisance is declared, that means that they no longer have a property interest. They no longer have the right to maintain, and even in Crossman they talk about they have lost their right to repair, and so it is at that time, when that decision is made, that they lose their right to repair, so they shouldn't be going in repairing. It shouldn't matter, the time between that order and the demolition. There's always going to be a time. What if there had been an injunction that had prevented the City? Then we would be all the way going through an appeal on the substantial evidence, maybe all the way to the Supreme -- it could take several years and be enjoined. So then would the City have to relitigate, because now we're going to get demolish because the order is now final? So the City shouldn't have to do that, because the order means that they've lost their right, and unless that right is reestablished somewhere, then they shouldn't be making any repairs.

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JUSTICE DAVID M. MEDINA: Does the City have these type of problems, many of them, a few of them? I read an article regarding that Houston, that the City of Houston is faced with many of these type of problems where there's a blight throughout the City, but there's no, there's no one there to demolish these places that become crack havens and properties for --

ATTORNEY BARBARA E. ROSENBERG: We do -- I don't have any statistics on how many we try to demolish. The whole purpose of the process is to try to get substandard buildings up to code and actually be proper habitable homes and properties. And so that is the purpose, is to give people notice so that they can repair and to make the repair orders. And that's what the statutes and that's what the Legislature has authorized, and so, yes, the City is always dealing with code violations. Some of them don't come to the level of being a nuisance hazard. You know, some things, even if they're not up to code, they're not going to be the kind of health and safety hazard that would allow a demolition.

JUSTICE EVA GUZMAN: Do you know the ratio of notices sent to demolitions? In other words, are most of these properties eventually repaired or do most of them go into the demolition phase?

ATTORNEY BARBARA E. ROSENBERG: I do not have any answer to that. I can try to find that out and get that information.

JUSTICE DALE WAINWRIGHT: Ms. Rosenberg, you've cited some case law and taken the position that once the URSB determines that the property is an urban nuisance and should be demolished, property owners lose their property interest and have no right to repair. In this case, apparently there was code violations for ten years, 1993 to perhaps 2002. Apparently a series of them, so in that situation, you can see some force in your argument. What if there's just one violation however, and a property owner who is in the next county and doesn't know about it? The property owner lives in the next county, the property is in Dallas County, one violation, there's a determination that it's a nuisance, and the property owner finds out about it and wants to fix it? In a case where there's just a single violation or violations over a short period of time, wouldn't you want the property owner to fix it?

ATTORNEY BARBARA E. ROSENBERG: Yes, we would want the property owner to fix it, but they would have notice, the opportunity for a rehearing. They also have the appeal process, which was also here, to be able to establish that it wasn't a nuisance. And I think that just because it's a substantial evidence review, doesn't mean that the Court wouldn't be able to review the decision for being arbitrary or illegal or, you know, some sort of fraud with it. And that's what -- I mean there was that kind of review here in this case.

JUSTICE DALE WAINWRIGHT: Well, in my example, the property owner has appellate review rights, but still no right to come and repair the property and bring it up to code?

ATTORNEY BARBARA E. ROSENBERG: Right, at that point. At that point. But they have the right to --

CHIEF JUSTICE WALLACE B. JEFFERSON: Ms. Rosenberg, I realize that your argument here is not about the factual sufficiency of the jury's answer on public nuisance, but the jury did reject the claim that the property was a nuisance. What was the evidence to support the jury's answer?

ATTORNEY BARBARA E. ROSENBERG: Well, it was just the -- they looked at the same facts and they weighed them, the same facts that there wasn't anything any different than had been in the URSB hearing. There wasn't anything about repairs being made. It was just the same facts, and the jury looked at the same facts and came to a different conclusion.

JUSTICE HARRIET O'NEILL: Does the common law definition of nuisance differ from the statutory definition here?

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ATTORNEY BARBARA E. ROSENBERG: No, it doesn't, because the statutory definition is about whether or not the property is a hazard to health and safety, which is what a nuisance, what a nuisance is.

JUSTICE HARRIET O'NEILL: But does the common law definition have some sort of continuing element in it that's not in the statute? The reason I ask that, I mean at what point could a municipality enact an ordinance that was a great deal less requirement to establish a nuisance? First there's the common law requirement to establish a nuisance.

ATTORNEY BARBARA E. ROSENBERG: Well, I don't think they have to be exactly the same. I think the Court in Crossman said that the State can authorize agencies to, the State to define what a nuisance is. As long as it's not something that is just like paint or something that's superficial or that kind. It has to be structural, it has to be something that's health and safety. And I think even in that, the judicial review could look at whether or not what was being considered a nuisance is actually a nuisance, which is more than just is there a scintilla of evidence that that particular fact existed, because then that would make it illegal or arbitrary in what the City's ordinance is. Here, the City's ordinance follows the authorization that the Legislature gave, which was to have building standards. It does not provide, the ordinance doesn't provide for demolition unless it is a hazard or is a nuisance, which is defined in the same way that the Legislature has defined a nuisance under Chapter 214.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Ms. Rosenberg. The Court is now ready to hear argument from the Respondent.

MARSHALL: May it please the Court, Mr. Staev will present argument for the Respondent.

ORAL ARGUMENT OF JULIUS S. STAEV ON BEHALF OF THE RESPONDENT

ATTORNEY JULIUS S. STAEV: May it please the Court, the City of Dallas, in this situation and in this appeal, is in effect arguing that should a city board or any other municipality be given this right to have this quasi-judicial effect and have finality of judgments based on its decision, would in effect allow various cities and empower various cities and local governments to destroy or knock down citizens' homes merely based on a scintilla of evidence.

JUSTICE EVA GUZMAN: Didn't this go on for ten years, from 1993? She had ten years to get -- how long is it good policy to wait for finality?

ATTORNEY JULIUS S. STAEV: Well, Your Honor, various cases, when one reads them, involve really a variety of facts in terms of how these boards deal with matters. There's all sorts of issues that have to do with how severe or how intense the situation is. In this case, my client's home basically was a brick veneered house in really an up and coming street. And ultimately most of her problems came really from an officious neighbor that did not like being next to the only house on the block that had peeling paint and had some things in the backyard.

JUSTICE HARRIET O'NEILL: Well, but there were more problems than that. I mean stolen goods had been found in the home and vagrants had been found in the home. I mean it wasn't just a complaining neighbor.

ATTORNEY JULIUS S. STAEV: Well, that's not true, Your Honor. In fact, that was a heavily contradicted part of the facts during the trial. That was what the city inspector alleged during the trial, but ultimately my client contradicted all of that in her testimony and said that in fact -- and I'm not really aware of any real evidence to that degree. There really was never any vagrants in the house, that is simply not true. And basically all of the -- there's a long list of complaints that the city inspector made about the house, but ultimately it turned out, that once we had a trial, that he had never even been inside the house. And as it was boarded up, he was literally peeking only through a window from one room and presuming that all of

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these things are wrong. There were some things stored in the house that did not give it a clean look inside, but it certainly was not the kind of public danger or hazard that the City had alleged once we had a trial.

JUSTICE EVA GUZMAN: Well, what is a reasonable time to comply, though, to cure the defects?

ATTORNEY JULIUS S. STAEV: Well, it depends on the board and what they're willing to negotiate or agree with with the particular homeowner. Some boards in some of the case law have been extremely fast and have given homeowners little or no opportunity to fix major repairs. Here my client was given a long time to fix some things, but they were not of a really severe nature. Most of the complaints had to do with just the maintenance of the structure. It needed paint. There was an attached shed that was not really part of the house; it was just sort of like a sunroom that was falling down in the back that caused a lot of the problems.

JUSTICE PHIL JOHNSON: How many hearings were there administratively that your client attended?

ATTORNEY JULIUS S. STAEV: For some reason she was not able to attend the first hearing. She is a school teacher and for some reason --

JUSTICE PHIL JOHNSON: Well, my question was how many? So she attended the one motion for rehearing --

ATTORNEY JULIUS S. STAEV: She attended the -- yes.

JUSTICE PHIL JOHNSON: -- after the first one, and she attended the rehearing?

ATTORNEY JULIUS S. STAEV: Yes, she attended the rehearing and testified there.

JUSTICE PHIL JOHNSON: A year later, did she attend more hearings?

ATTORNEY JULIUS S. STAEV: I believe the way it flowed is that there was an initial hearing, which she did not, I was not able to participate in, and then asked for a rehearing. And at the rehearing, she did show up and testify at that rehearing, and I believe it was at that rehearing that the board order was confirmed and ultimately the house was demolished within weeks after that.

JUSTICE PHIL JOHNSON: So did she attend any more hearings other than the one on her motion for rehearing? Is that the only one she attended?

ATTORNEY JULIUS S. STAEV: Yes, sir, that was the only one she attended, but I don't believe there was more hearings than that.

JUSTICE DALE WAINWRIGHT: The briefing says that she attended the September 2001 initial hearing.

ATTORNEY JULIUS S. STAEV: The initial hearing? I'm not sure about that, Your Honor, I don't think so.

JUSTICE DALE WAINWRIGHT: The initial hearing, but it was before the rehearing, September 2001. Is that incorrect?

ATTORNEY JULIUS S. STAEV: I may be slightly confused over that. My impression was that there was two hearing. If there was three hearings, then she attended to the last two.

JUSTICE DAVID M. MEDINA: What did this board do that the Legislature did not give it authority to do?

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ATTORNEY JULIUS S. STAEV: I'm sorry, Your Honor.

JUSTICE DAVID M. MEDINA: What did the board do that it did not have authority to do under this legislative statute? And does it matter if the house was a nuisance on the day that it was demolished or not a nuisance, as Justice Morris said in his opinion?

ATTORNEY JULIUS S. STAEV: Well, I'm not sure how to answer your question in terms of what the board did that it was not supposed to do. I can answer as to what they're trying to --

JUSTICE DAVID M. MEDINA: Well, did they follow the legislative procedure? Did they send out notice, had a hearing, and then they made the decision to demolish?

ATTORNEY JULIUS S. STAEV: Yes, they did follow Legislative procedure, even though there was a cause in front of the jury trial on the takings claim where my client alleged that some notice requirements were not met in fact by the City in terms of giving her a final -- traditionally, the City of Dallas gives a final notice of their intent to demolish and a date and a time, which gives people a chance to realize that the demolition is truly now happening versus -- there's always a period of time. And gives them a chance to go in, literally remove themselves, remove their possessions. In this case, the City skipped giving that final notice of the actual date of demolition and caught my client by surprise, and her possessions were still in the house. And they relied on simply saying that, “Well, you've known for whatever months or years that there was an order pending, and you should have immediately cleared out.”

JUSTICE EVA GUZMAN: Was it, though, 39 days or so from the order to the day of demolition?

ATTORNEY JULIUS S. STAEV: Yes, and --

JUSTICE EVA GUZMAN: So we're really talking she knew for 39 days that something had happened?

ATTORNEY JULIUS S. STAEV: Yes, that's true. And to a degree, I think my client was relying on us filing the appeal for the judicial review, and not that we presumed that the City would automatically stop, but we figured there would be a negotiation phase that we could discuss what needs to be done to avoid the demolition.

JUSTICE EVA GUZMAN: This had been going on for ten years, and after that last order, ten years later she thought that you would stay on course a little bit longer with it?

ATTORNEY JULIUS S. STAEV: Well, again, we were surprised by how quickly the City demolished it. My client could not afford to fight aggressively and seek an injunction. It requires, obviously, a lot more energy, and we did not stop it, so it came as a surprise. But, again, Your Honor, I think we keep on saying this “ten year lag.” I think there's a little bit more to that. There were times when there were complaints raised and she addressed those complaints, and it kind of got quieted down and things were put to bed. And then new complaints came up a year or two later and then the proceeding was started again. It was not that this ruling was ten years-old, this ruling was only one or two years-old.

JUSTICE DALE WAINWRIGHT: In 1996 apparently inspectors found the property was open and vacant and occupied by vagrants. Was it boarded up in '96? Do you remember what year it was actually boarded up?

ATTORNEY JULIUS S. STAEV: It was boarded up pretty much immediately upon the City raising that as an issue.

JUSTICE DALE WAINWRIGHT: In '96?

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ATTORNEY JULIUS S. STAEV: I can't speak exactly to --

JUSTICE DALE WAINWRIGHT: But the initial code violation is in '93?

ATTORNEY JULIUS S. STAEV: Well, like I said, it was a continuous flow of violations. Some were taken care of, and then it quieted down, but --

JUSTICE DALE WAINWRIGHT: When was it boarded up?

ATTORNEY JULIUS S. STAEV: I think it had -- I cannot speak to the exact day, but it was boarded up for years before finally being demolished. And ultimately, in situations where things she had not done, the City did come in and do those things for her and billed her. For example, the chain-link fence, part of that fence was put up by the City immediately upon it having the complaint, so that was immediately taken care of. And then ultimately, I'm not sure whether they did it or she did it, but it was boarded up pretty quickly.

JUSTICE DALE WAINWRIGHT: So this sounds consistent with the briefing. You acknowledge that the home was boarded up or the building was boarded up for a number of years before it was demolished?

ATTORNEY JULIUS S. STAEV: I believe that's probably true. But when we say, "boarded up," Your Honor, you have to consider that this is a brick veneer house, there's a window here and there. Only like -- I believe only one or two windows on side that were not necessarily visible to the street were boarded up. I would not suggest imagining a building entirely boarded up, which is a complete eyesore. It was not so. In fact, photographs show that the biggest eyesore, as you drive past it, was the fact that above the brick veneer was a wooden area in the attic area with a window. That was one of the things that my client boarded up, and that window was boarded up. It was a small just vent window on top.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, that was in 2002 during that rehearing in September, the only significant repair that was made. And from what I understand of the record, Stewart admitted during that rehearing that the home was unoccupied, that the windows were boarded, and that the interior had been breached on occasion. Is that not correct?

ATTORNEY JULIUS S. STAEV: It was not my understanding that the interior had been breached. The City alleged that, but I believe my client did not agree with that. She was not aware of it being breached. I may not recall that very, very fact from the trial, but I remember that being discussed.

CHIEF JUSTICE WALLACE B. JEFFERSON: At the record, pages 66 through 70, Stewart admitted, from my reading of it, quote, "I do know that there had been one break in because some drawers had been emptied in the house."

ATTORNEY JULIUS S. STAEV: It's possible, Your Honor, I apologize.

JUSTICE HARRIET O'NEILL: But isn't that the very problem? I mean the board made a factual determination in an area that's been delegated to that board to make, and if we then have a jury making a different determination, what spot does that put the City in in terms of being able to obtain demolition orders?

ATTORNEY JULIUS S. STAEV: Well, Your Honor, this is the fine balance that we're discussing today that needs to be decided. And this fine balance, from my research and my understanding of the law, has generally been consistent for decades. However, in the very last few years, there have been a couple of errant cases that have come up where they've made a decision to say now that, "You know what? The board's decisions for Chapter 214 of the Local Government Code, should have the same effect as a court, have preclusive effect, and there should be no right to bring a case under the Constitution for a takings claim." But that's the fine balance. Without a homeowner's ability to have a jury actually conduct a full trial

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with evidence and testimony and rules of evidence and so forth, all we are left with is the board having the absolute discretion to make decisions as to the demolition of people's houses, simply having to show a scintilla of evidence that they conducted the hearing and received a scintilla of evidence. And then if we go with what the City is suggesting, then once that happens, it's the end of the road, and, therefore, that means that some cities which can be capricious and politically motivated in terms of some of these boards can really --

JUSTICE HARRIET O'NEILL: But that hasn't been alleged here. I mean as long as the decision is not capricious or arbitrary, then why wouldn't we allow the City, pursuant to police power, to be able to abate these nuisances in a timely manner? If we throw it into the judicial system, it can go on forever.

ATTORNEY JULIUS S. STAEV: Well, there's no allegation that this City has been capricious, certainly, but what I'm saying is that some cities have the potential to be that way, and if we make the decision today that there is no Constitutional protection for what the cities do simply based on a scintilla of evidence, the balance would change so dramatically. And, you know, in effect this will serve as an amendment as a sort of a backdoor amendment to the Constitution. Because if it was to be said that Chapter 214 of the Local Government Code means that you can no longer have Constitutional protection for a taking in terms of demolition orders, then in effect what we're doing is, in part, amending that Constitutional requirement. We're giving more power to the boards that is actually subject to Constitutional limitations. And in fact, a lot of the cases that get discussed in these briefs, all have to do with licenses and privileges, and a lot of them skirt the issue that this is really about property rights. And traditionally, the greater weight of the case law is that when it comes to property rights, the Constitution is paramount. And what's interesting also is that the Legislature, in the historical notes that have been attached with some of the briefs, does not get into a discussion of what effect does this have on the Constitutional limitations. And which leads us to believe, or leads me to believe at least, that it was not in the Legislature's intention that Chapter 214 goes so far as to give this quasi-judicial power to boards merely on a scintilla of evidence, and to abolish the Constitutional protection. And there's no -- I think if that were the case, there would have been debate and there would have been an express mention in the Constitutional history that that was their intent. Yet there isn't. And many, many courts have continued to rule this way, that this a separate line independent -- a person's ability to file a takings claim is a separate line of approach that is separate and apart from the Local Government Code and these board hearings, which were intended to be quick and final. That's why the --

JUSTICE PHIL JOHNSON: What purpose is served by the whole administrative process, if once we get through with that process, your client or a property owner then can file a lawsuit and say, “Well, we think that they were wrong over there, and now we have $75,000 worth of our property taken”? It seems like that would completely negate everything that has gone on administratively.

ATTORNEY JULIUS S. STAEV: On the contrary, Your Honor. The process is streamlined by that law. Cities get to decide, move ahead with their demolitions. The board's order can be appealed one final time to the district court under the substantial evidence rule.

JUSTICE PHIL JOHNSON: Right.

ATTORNEY JULIUS S. STAEV: I call it sort of as a final administrative appeal. That could be one way to explain it. And then once that is done, the board order becomes final. But --

JUSTICE PHIL JOHNSON: But if they destroy the house then, under your theory, you still try it to a jury and all this is no effect if a jury says it was not a nuisance. It seems like we've gone, and the City is going to have to pay every time with a brand new trial. It looks like it's just a de novo review really, after the fact.

ATTORNEY JULIUS S. STAEV: Well, in a way it would be, Your Honor, except for the fact that, again, the Constitutional protection for this kind of governmental action is paramount.

JUSTICE PHIL JOHNSON: Well, but you're not saying that the administrative procedure is

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unconstitutional.

ATTORNEY JULIUS S. STAEV: No, there are a number of cases that that's already been litigated heavily, whether the process is Constitutional, and it has been found to be Constitutional in terms of -- but for what it stands. It has not been clear, in fact, that while that is the case, that this abolishes suddenly people's rights to ultimately bring a sort of a check on this entire process by filing a nuisance and a taking action.

CHIEF JUSTICE WALLACE B. JEFFERSON: But doesn't the Act say that the review, any review is substantial evidence? It's not a jury trial with de novo review?

ATTORNEY JULIUS S. STAEV: But that's the whole point, Your Honor, that the review is based on substantial evidence, which really nullifies it as any kind of real judicial proceeding. It is really meant to give one quick check to --

CHIEF JUSTICE WALLACE B. JEFFERSON: But I thought the Lurie case, L-u-r-i-e --

ATTORNEY JULIUS S. STAEV: Yes.

CHIEF JUSTICE WALLACE B. JEFFERSON: -- left room for an administrative procedure where the review would be substantial evidence. Isn't that precedent for what the Legislature did here and what actually occurred in this case?

ATTORNEY JULIUS S. STAEV: Well, you could be right that it left that door open, but I think in looking at this currently, I don't believe that that is the ultimate result in terms of what the Legislature intended. And interestingly enough, if what the city is proposing is that if in the judicial review, if the order is confirmed -- no, I'm sorry -- if the order is reversed, but if the city in the meantime had gone ahead and demolished the house, then really what that means is there would be no live demolition order. But yet when the homeowner goes to sue the City now under the Takings Clause, and the City agrees that this is the only way that a Takings Clause case is still available, and that would be if the demolition order is reversed, but yet the City had nonetheless gone ahead and demolished. But that's sort of also presents a little bit of a quandary in that that kind of a case, because in that case now, the homeowner would have to, you know, be proving that the case [sic] was demolished without a lawful order, which it was because the order was reversed, but yet the City can still defend as it normally can that the property was a nuisance in fact on the day it was demolished anyway. So now the City would have a second bite at the apple, which is sort of a really unexpected result. So now we have the homeowner suing the city for the taking, but yet now the city happens to have this extra leeway to defend by saying, “Well, it really was a nuisance in fact.” There's nothing stopping them from doing that, even though there's no board order that's live and that will control the situation, but we can still look to the facts and have our own witnesses and code inspectors testify that regardless of the fact that the board order was reversed, the property was still a nuisance in fact. So this problem in reconciling these procedures, I think comes from the fact that these two areas of law are separate and meant to be independent tracts. And that is that the Constitutional tract is independent from the local government tract, which was intended to allow cities to quickly get demolition orders and get them done. I would suggest --

JUSTICE DON R. WILLETT: I remain a little confused on the procedural sort of timelines here. Can you kind of just take me through very briefly, in '02. Okay, so we know in May of '02, notice of demolition sent. Correct?

ATTORNEY JULIUS S. STAEV: Yes, I believe maybe the notice of demolition was sent from the first initial demolition order, which may have been a year or so prior to that. So there is no new notice of demolition sent after the final rehearing.

JUSTICE DON R. WILLETT: Take me through the '02 chronology of notices sent and appeals that were made.

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ATTORNEY JULIUS S. STAEV: The board hearing conducts their final review, the final rehearing.

JUSTICE DON R. WILLETT: When?

ATTORNEY JULIUS S. STAEV: It was -- again, I should have had the chronology better in front of me, but it was at that time. Probably in May of '02. And then immediately after the board hearing, my client files a --

JUSTICE DON R. WILLETT: Rehearing?

ATTORNEY JULIUS S. STAEV: I wanted to start with the final rehearing from the board.

JUSTICE DON R. WILLETT: You've got 15 seconds.

ATTORNEY JULIUS S. STAEV: I'm sorry?

JUSTICE DON R. WILLETT: You've got 15 seconds left.

ATTORNEY JULIUS S. STAEV: Okay, let's start with the final rehearing by the board, where you have to appeal it within 30 days before it becomes final. My client appeals it within 30 days before it becomes final, and then the district court conducts a limited review, sort of as another final appeal. The district court affirmed that they did not make any determination that the property was nuisance, it simply affirmed that under the substantial evidence, that the board was legal and affirmed the board, which makes it final. And then once that board is final, then my client files a separate and independent lawsuit for a taking under the Constitutional claims. I'm not sure if that answered your question. So I guess perhaps, or maybe I can just -- can I explain that further?

JUSTICE DON R. WILLETT: No, I'm fine, I'm fine.

ATTORNEY JULIUS S. STAEV: Okay.

CHIEF JUSTICE WALLACE B. JEFFERSON: I see that your time has expired, Counsel. Are there further questions? Thank you very much. And the Court will hear rebuttal now. Thank you.

ATTORNEY JULIUS S. STAEV: Thank you, Your Honors.

REBUTTAL ARGUMENT OF BARBARA E. ROSENBERG ON BEHALF OF PETITIONER

JUSTICE DAVID M. MEDINA: Does it matter that the board didn't send its final, final order out of notice of demolition?

ATTORNEY BARBARA E. ROSENBERG: Well, the final -- there was a final order that was sent on September 26 by certified mail. Whether she picked it up or not isn't in the record, but an order was sent at that time. Now I don't know that it said the date of the demolition was going to be, but that procedure isn't required to do that. What we were doing at that time was just getting the reinspection and then the warrant.

JUSTICE DAVID M. MEDINA: What if during that period of time the reinspection showed that there was substantial improvement to the property?

ATTORNEY BARBARA E. ROSENBERG: Well, in that case, then the warrant wouldn't have been issued by the magistrate. There wouldn't have been -- the affidavit would have said that and then the inspector

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wouldn't have gone to the magistrate to get the --

JUSTICE DAVID M. MEDINA: Well, how do we know that? I mean there seems to be a dispute in all the factual evidence here. I mean one side says they were in partial compliance, and the City says, "No, they weren't in compliance for ten years." You both can't be right, so how do we know that?

ATTORNEY BARBARA E. ROSENBERG: Well, I think that was the problem, but there was, there was a finding -- there wasn't any other finding other than, at that time, other than what the URSB had found. She admitted she hadn't made the repairs. This had been going on, I think the first order of the -- the September 2001 Order shows that there had been an order in April of 2000, in which, a demolition order, which may have been a repair and demolish or a demolition order.

JUSTICE DAVID M. MEDINA: Well, what's the triggering date if these orders go back a hundred years and there's some modification to the property where the City backs off and says, "Okay, it's fine now." And then something happens later and the City doesn't like it, "You've got to make this repair." I mean there has to be a triggering point, and you say it's ten years from when they initially received notice. The other side says, no, they made some compliance, so it starts over. What's the triggering date?

ATTORNEY BARBARA E. ROSENBERG: Well, I think that the property owner has to tell the City something. I mean there could be repairs made that you can't tell when they got out to inspect or look on the property. It shouldn't be -- if the property -- when in the face of an order that has now denied them the right to the repair, they go ahead and repair, they need to bring something. They need to seek a modification of the order, they need to get an injunction. It shouldn't be the City's responsibility. The City has done what it's supposed to do. It went and there were a hearing, the hearing was held. There was a rehearing held. Evidence was taken, a preponderance of evidence.

JUSTICE NATHAN L. HECHT: Let me ask you about that, if I might.

ATTORNEY BARBARA E. ROSENBERG: Okay.

JUSTICE NATHAN L. HECHT: That's the part I'm confused about. If the City just made an executive decision to tear down a building because it was a nuisance, it wouldn't have to follow these procedures. It could just do that and take the risk that it would have to defend a takings claim on the basis that it was a nuisance, right?

ATTORNEY BARBARA E. ROSENBERG: Exactly.

JUSTICE NATHAN L. HECHT: And if it did that, it would have to prove its defense by a preponderance of the evidence?

ATTORNEY BARBARA E. ROSENBERG: That's correct.

JUSTICE NATHAN L. HECHT: But here you're saying we don't have to prove our defense because it's been found by the board, right?

ATTORNEY BARBARA E. ROSENBERG: Exactly.

JUSTICE NATHAN L. HECHT: But by a lesser standard of evidence?

ATTORNEY BARBARA E. ROSENBERG: No, it's been found by the same standard of evidence.

JUSTICE NATHAN L. HECHT: Why is that?

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ATTORNEY BARBARA E. ROSENBERG: The evidence that they're complaining about is the review by the district court, which was a substantial evidence, but the original finding of nuisance by the board under the ordinances is by a preponderance of evidence. It is the same; it is the same evidence weight that is done at the initial hearing.

JUSTICE NATHAN L. HECHT: But to determine if the board really did that or not, we don't really look too closely. The substantial evidence review just says if they got close, basically, that's good enough. Right? It's a lesser --

ATTORNEY BARBARA E. ROSENBERG: Well, as far as the facts. If there was some evidence -- there was evidence, yes.

JUSTICE NATHAN L. HECHT: And why isn't that a Constitutional problem?

ATTORNEY BARBARA E. ROSENBERG: It's not a Constitutional problem because what the Constitution provides under Section 19 of Article 1 is due process, and what has been found over and over again is that this process provides due process. So it isn't about what standard of review is used in the district court to find it, it's whether the person's had notice, the opportunity to participate. In these City proceedings, they're able to call witnesses, you can compel attendance, they take oaths. This Court has found over and over that substantial evidence review when property rights are involved meets the, substantial evidence review meets that Constitutional standard. In the Blackbird case, and also in the Brazosport Savings that the State cited in their Amicus. So the Constitution, there isn't any separate Constitutional process that's involved here. It is the process of having due process before this nuisance is determined, and that's what they had here. And so because of that, the decision of the URSB and the Court, because the district court is a decision, and substantial evidence reviews are due res judicata, the Kramer case by the U.S. Supreme Court. So res judicata and collateral estoppel should apply to this decision to prevent the takings claim in this case, and we ask that the Court reverse and render the trial court's decision. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counselor. The cause is submitted, and the Court will take a brief recess.

MARSHALL: All rise.

[End of proceedings.]

City of Dallas, Petitioner, v. Heather Stewart, Respondent.
2010 WL 710004 (Tex.) (Oral Argument)

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