# SUBSTANDARD STRUCTURES: OPTIONS AND OBSTACLES

TCAA SUMMER CONFERENCE - SAN ANTONIO RIVERWALK 2019

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CITY OF BRYAN, TEXAS THE GOOD LIFE, TEXAS STYLE ™

# **OUTLINE**

- Introduction
- Statutory authority
- Dallas v Stewart
- Summary Abatement

# INTRODUCTION

Nuisance abatement is a core exercise of the city's police power to protect public safety

#### Benefits include:

- Improved property value
- Reduced crime
- Fewer injuries and illness

#### Powerful tool

- Vacate
- Repair
- Demolition

"With great power, comes great responsibility" – Spiderman's uncle



- LGC Ch. 54 SUBCHAPTER C. QUASI-JUDICIAL ENFORCEMENT OF HEALTH AND SAFETY ORDINANCES
  - Building and Standards Commission

- LGC Ch. 214 SUBCHAPTER A. DANGEROUS STRUCTURES
  - Municipal court
  - Governing body



#### All processes generally the same:

- Notice
- Hearing opportunity to be heard
- Judicial appeal



#### Scope of most orders

- Vacate
- Secure from unauthorized entry
- Shut off utilities
- Repair
- Demolition





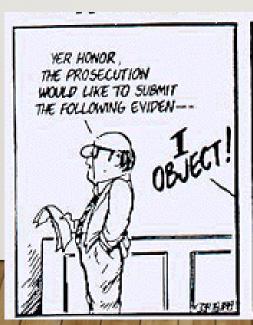


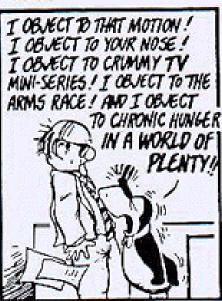


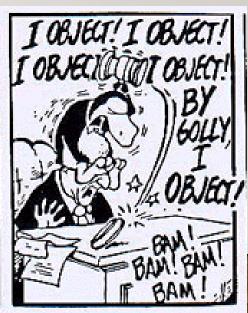


#### **Appeal**

- Within 30 days of notice of the order
- Record owner/lienholder/mortgagee
- Petition for writ of certiorari in District Court
- State that order was illegal, basis of claim
- Verified







#### Writ of Certiorari may be granted

• Give a deadline, not less than 10 days, for return

Review under substantial evidence rule......

Or is it?????

#### Relief available

- Uphold, overturn, modify order
- No court costs may be awarded against city
- If order upheld, city entitled to attorney's fees

# DALLAS V. STEWART – GAME CHANGER

- Nuisance property
  - Code violations
  - Tree fell on neighbor's house
  - Unsecured
- URSB hearing
  - Ordered demolished
- Appeal to District Court



# DALLAS V. STEWART – GAME CHANGER



- Demolition of house
  - Per § 54.039(e) appeal does not stay proceedings
- Amended petition
  - Takings claim added

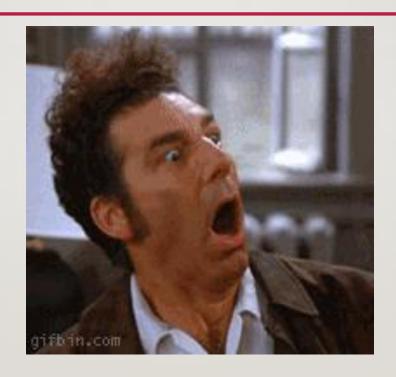
#### DALLAS V. STEWART – GAME CHANGER

- District court upheld URSB
  - Awarded attorney's fees for Dallas
  - Court severed takings claim and had trial
  - Jury awards \$80k to Stewart
- Appeal to 5<sup>th</sup> Court of Appeals
  - Decision upheld on other grounds
- Appeal to Supreme Court



# DALLAS V. STEWART - APPEAL

First opinion – July 1, 2011



# DALLAS V. STEWART - APPEAL

Second opinion – Jan. 27, 2012

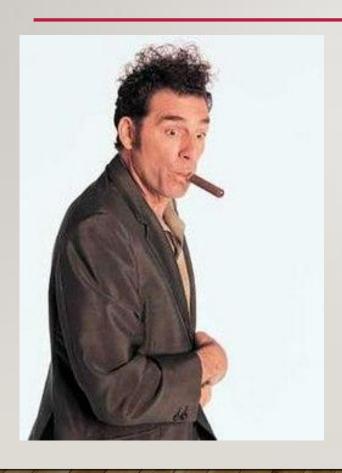
Takings claims must be raised on appeal from agency decision

De novo review only required if they file an appeal

Property owners rarely invoke the right to appeal



# DALLAS V. STEWART - APPEAL



#### Subsequent opinions

- Patel Jan. 27, 2012
  - Statutory appeal must be taken to conclusion
- Como Aug. 2012
  - Statutory appeal must be filed

#### DALLAS V. STEWART – HOLDING

Agency decisions are not "res judicata"

 Constitutional claims must be considered de novo by courts

 Collateral estoppel bars constitutional claims not raised during statutory appeal



- Collateral estoppel cannot attack collaterally what you do not challenge primarily
  - Must file statutory appeal and prosecute to conclusion
  - Must raise constitutional claims during statutory appeal
- Statutory pre-reqs for suit
  - Within 30 days
  - Petition for writ of certiorari
  - In district court
  - Record owner
  - Verified



- Plea to the Jurisdiction
  - With answer or shortly thereafter
  - Can be based on pleadings or testimony
  - Resolve case without reference to the merits



- Appeal of Agency Nuisance Determination
  - De novo review?
  - Substantial evidence review without preclusive effect?
  - De novo trial?
- Conventional Wisdom
  - De novo review of return on writ
  - Trial, if necessary, on constitutional claims



#### Motion for Summary Judgment

- A de novo review of the record, no fact issues to resolve
- Court makes its own nuisance determination, which would have preclusive effect on takings claims
- Other constitutional claims can be resolved based on summary judgment evidence



#### DALLAS V. STEWART – TAKE AWAY

#### Do not demolish properties pending appeal!!!

LGC §§ 54.039(e) and 214.0012(e) appeal does not stay proceedings on the decision appealed from

#### Lower risk options:

- Vacate
- Secure
- Shut off utilities



# **SUMMARY ABATEMENT**

• Emergency situations or imminent danger

Notice and hearing not practical

• Due process still required



#### **SUMMARY ABATEMENT**

Post deprivation process can be constitutional

- Procedural safeguards
  - Shared decision making
  - Clear standards for imminence
  - Post deprivation notice

Judicial appeal still possible

#### CITY OF NEW ORLEANS OFFICE OF PLANNING AND DEVELOPMENT

Bureau of Code Enforcement Contact Info: (504) 658-4300 or (504) 658-4200

#### NOTICE OF CONDEMNATION FOR PUBLIC SAFETY AND WELFARE

Notice Date: 5/14/07

The City of New Orleans pursuant to Section 26-264(a) has inspected this property and has determined this property to be an imminent threat to the public health, safety and welfare.

Section 26-264. Emergency Condemnation and Demolition of Buildings for Threat to the Public Health, Safety and Welfare.

(A) ANY BUILDING OR OTHER STRUCTURE DAMAGED BY HURRICANES KATRINA AND/OR RITA OR RENDERED UNINHABITABLE BY ANY ACT OF GOD WHICH, UPON INSPECTION BY THE DIRECTOR OF CODE ENFORCEMENT, OR HIS DULY APPOINTED REPRESENTATIVE, IS DEEMED BY HIM TO POSE A SERIOUS, IMMINENT AND CONTINUNING THREAT TO THE PUBLIC HEALTH, SAFETY AND WELFARE BY REASON OF BEING UNREMEDIATED, UNGUTTED, OPEN TO THE PUBLIC, UNSAFE, UNSANITARY OR CONDUCIVE TO ILL HEALTH, SHALL HAVE THE AUTHORITY TO CAUSE THE DEMOLITION OR REMEDIATION OF SUCH BUILDINGS.

YOU ARE HERBY NOTIFIED THAT THE CITY OF NEW ORLEANS WILL PROCEED WITH THE DEMOLITION OR REMEDIATION OF THIS PROPERTY AFTER THIRTY (30) BUSINESS DAYS FROM THE DATE OF THIS NOTICE.

DO NOT ALTER, DEFACE OR REMOVE THIS NOTICE

# THE END