Substandard Building Cases in a Post-*Stewart* World

Texas City Attorneys Association Summer Conference

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IRVING
TEXAS

What has happened since….

City of Dallas v. Heather Stewart

The Heather Stewart case recap

- *Stewart I* - Texas Supreme Court opinion issued July 2011:
  - "substantial evidence review of a nuisance determination resulting in a home's demolition does not sufficiently protect a person's rights under Article I, Section 17 of the Texas Constitution"
- *Stewart II*, 361 S.W.3d 562 (Tex. 2012) - On 1/27/12 the Texas Supreme Court withdrew the *Stewart I* opinion and reissued a substantially similar opinion, clarifying that:
  - "takings claims must be asserted on appeal from the administrative nuisance determination"
  - "a party asserting a takings must first exhaust its administrative remedies and comply with jurisdictional prerequisites for suit"

Stewart affirmed

- *Patel v. City of Everman*, 361 S.W.3d 600 (Tex. 2012) issued the same day as *Stewart II*:
  - Appealing party must timely appeal BSC order
  - If do not timely appeal and assert the takings claim in that appeal, then cannot bring takings claim
  - Owner who nonsuited appeal of BSC order precluded from later bringing takings claim in another proceeding
- *City of Beaumont v. Como*, 381 S.W.3d 538 (Tex. 2012, reh'g denied)
  - First Texas Supreme Court case to interpret *Stewart* and *Patel*'s holdings - City wins when property owner doesn't appeal BSC order and then brings takings claim suit 1 year after demolition

Revisit *Stewart?*

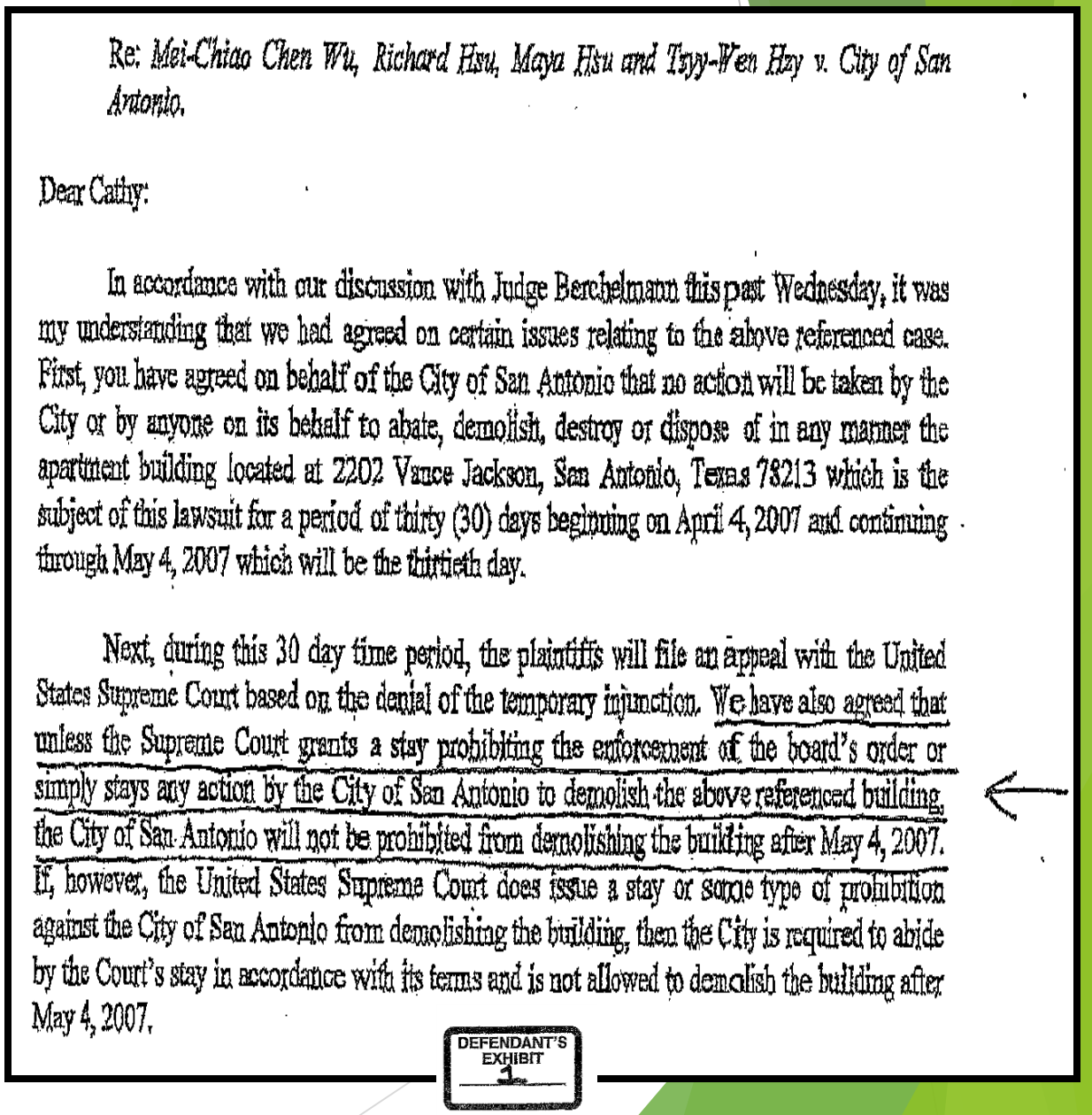
Not for now says the Texas Supreme Court

Wu v. City of San Antonio, 2013 WL 4084721 (Tex. App. – San Antonio 2013, pet. denied)

- Appeal of board's determination that apartment building was a public nuisance and request for temporary injunction to prevent the demolition of the buildings
- Trial court denied the application for the temporary injunction, affirmed by the court of appeals, writ of mandamus denied by Texas Supreme Court
- Rule 11 agreement entered between parties while awaiting mandamus ruling; owner said city not prohibited from demolishing after 30 days if Court did not stay the demolition
- After city demolished, owners/lienholders amended pleadings to assert takings claim
- Trial court granted summary judgment in favor of city

Wu v. City of San Antonio

- Court of Appeals rejects city's assertion that the takings claims must be brought at the same time and in the same pleadings as the original petition seeking judicial review of the board's order – says that is inconsistent with *Stewart*
- Reversed and remanded to trial court; continue to watch this case on issue of consent



Re: *Mei-Chiao Chen Wu, Richard Hsu, Maya Hsu and Tzyy-Wen Hsy v. City of San Antonio.*

Dear Cathy:

In accordance with our discussion with Judge Berchelmann this past Wednesday, it was my understanding that we had agreed on certain issues relating to the above referenced case. First, you have agreed on behalf of the City of San Antonio that no action will be taken by the City or by anyone on its behalf to abate, demolish, destroy or dispose of in any manner the apartment building located at 2202 Vance Jackson, San Antonio, Texas 78213 which is the subject of this lawsuit for a period of thirty (30) days beginning on April 4, 2007 and continuing through May 4, 2007 which will be the thirtieth day.

Next, during this 30 day time period, the plaintiffs will file an appeal with the United States Supreme Court based on the denial of the temporary injunction. We have also agreed that unless the Supreme Court grants a stay prohibiting the enforcement of the board's order or simply stays any action by the City of San Antonio to demolish the above referenced building, the City of San Antonio will not be prohibited from demolishing the building after May 4, 2007. If, however, the United States Supreme Court does issue a stay or some type of prohibition against the City of San Antonio from demolishing the building, then the City is required to abide by the Court's stay in accordance with its terms and is not allowed to demolish the building after May 4, 2007.

DEFENDANT'S EXHIBIT 1

HDW2000 256 E. 49th Street v. City of Houston, 2011 WL 722618 (S.D. Tex. Feb. 22, 2011) and 2012 WL 6095226 (Tex. App. – Houston [1st Dist.] 2012, pet. denied)

- Plaintiff owned several buildings which were found by the BSC to be dangerous, substandard and in violation of city's ordinances
- Plaintiff filed appeal of board's orders and later amended pleadings asserting state and federal due process claims
- City removed to federal court where summary judgment was granted on the state and federal due process claims; court remanded substantial evidence review to state court
- State court conducted substantial evidence review of board's orders and issued judgment that plaintiff take nothing, affirming the board's orders
- Court of Appeals finds more than a scintilla of evidence to support the BSC's finding that properties were dangerous, substandard buildings in violation of city's ordinance

Emergency demolitions

How to end up in Court quickly!

Kinnison v. City of San Antonio, 480 Fed. Appx. 271 (5th Cir. 2012)

- Immediate demolition of fire-damaged property determined to be clear and imminent danger to life, safety and/or property

Kinnison v. City of San Antonio

Kinnison v. City of San Antonio

- When the city's crew went to demolish the property, there was a contractor on site hired by the owner to repair the foundation; city proceeded to demolish

Kinnison v. City of San Antonio

- Owner filed suit in state court, alleging various state and federal claims; suit removed to federal court by the city
- District court granted summary judgment in favor of owner on his 4th and 14th Amendment claims and city appealed
- 5th Circuit says that a reasonable fact-finder could conclude that the City's imminent-danger determination was an abuse of discretion based upon:
  - NINE DAY delay between the inspection and emergency demolition
  - City had previously determined property to be in imminent danger 2 years earlier
  - City effected demolition in face of the owner's rehabilitation efforts
- Vacated and remanded

RBIII, L.P. v. City of San Antonio, 713 F.3d 840 (5th Cir. 2013)

- City demolished a dilapidated building without providing notice to the owner before the structure was razed
- Owner filed suit, asserting various state and federal claims
- District court granted summary judgment for City on all claims except 14th Am. procedural due process claim and 4th Am. Claim; those claims were tried to a jury which returned a verdict in favor of plaintiff and awarded $27,500 in damages
- City appealed

RBIII, L.P. v. City of San Antonio

- 5th Cir. says city ordinance authorized emergency demolition so city's decision to demolish without pre-deprivation notice was entitled to deference and did not constitute a due process violation unless it was arbitrary or an abuse of discretion
- District court's jury instruction was error because stated that the city was excused from providing notice to owner only if there was an "immediate danger to the public"
- Instruction misled the jury as to the central fact question in the case; vacated and remanded – district court instructed to reconsider city's motion for judgment as a matter of law

Summary Nuisance Abatement

That pesky due process issue keeps popping up!

City of Houston v. Carlson, 393 S.W.3d 350 (Tex. App. – Houston [14th Dist.] 2012, no pet.)

- 108-unit condominium complex declared uninhabitable due to various structural, electrical, and plumbing violations, including structurally unsound underground parking garage
- After the City received a structural engineer report that warned of danger of walls and entire buildings collapsing, the City summarily vacated the unsafe condominiums

City of Houston v. Carlson, 393 S.W.3d 350 (Tex. App. – Houston [14th Dist.] 2012, no pet.)

- The City conducted post-vacation order administrative hearing; order to vacate upheld by administrative hearing officer 6 days before buildings were required to be vacated
- Sixteen owners filed suit against City in district court seeking judicial review of the order to vacate
- District court reversed the order to vacate and granted a permanent injunction to the owners, concluding that the owners were not afforded due process of law

City of Houston v. Carlson

- On appeal, City argued TLGC §214.001 did not apply because property was vacated pursuant to the building code which authorized the Building Official to order a structure vacated immediately if it created a serious and immediate hazard to life or to property
- Court of Appeals rejected City's argument and said that TLGC §214.001 applied
- Court of Appeals held that the City failed to meet notice and hearing requirements of statute and that the City's substitute procedure did not satisfy procedural due process because it did not give plaintiffs a meaningful opportunity to be heard

Once the order to vacate was lifted, the homeowners association sold the complex, but the legal saga continued…

City of Houston v. Carlson, 451 S.W.3d 828 (Tex. 2015, reh'g denied)

- Group of (former) homeowners that filed due process claim later brought an inverse condemnation action
- Trial court sustained city's plea to the jurisdiction, concluding that the owners had not alleged a taking
- Court of Appeals reversed and City filed petition for review
- Supreme Court reminds that in the absence of a properly pled takings claim, the government retains immunity and court must sustain a properly raised plea to the jurisdiction

City of Houston v. Carlson

- The Court rejects the plaintiffs' assertion that a civil-enforcement procedure alone can serve as the basis of a regulatory-takings claim
- Since plaintiffs only complained about the "infirmity of the process" and did not contest the property-use restrictions or city's electrical, plumbing or structural standards, they did not allege a viable regulatory takings claim

"nearly every civil-enforcement action results in a property loss of some kind. The very nature of the action dictates as much. Nevertheless, that property is not 'taken for public use' within the meaning of the Constitution"

What is a Nuisance after all?

Stewart got it wrong!!!

Wood v. City of Texas City, 2013 WL 440569 (Tex. App. – Houston [14th Dist.] Feb. 5, 2013, no pet.)

- BSC ordered two properties w/ the same owner to be demolished
- Owner filed original petition challenging demolition orders and asserted takings claims
- Texas City did not demolish, and instead filed its own counterclaim seeking an order from the district court authorizing demolition
- District court found that the properties constituted a "public nuisance" and authorized the city to demolish; owner appeals
- Court of Appeals says evidence is sufficient that structures are public nuisances and thus no taking

"When a building creates a hazard to health, safety, comfort or welfare, a nuisance exists and the government, by virtue of its police powers, can abate that nuisance"

Amaya v. City of San Antonio, 980 F. Supp. 2d 771 (W.D. Texas, Oct. 30, 2013) and 2014 WL 7339077 (W.D. Texas, Dec. 23, 2014)

- Inspections over 1-year period; property deteriorated substantially; emergency demolition performed; letter sent to owner 4 days later
- Plaintiff files suit alleging various state and federal claims

Amaya v. City of San Antonio

- Court grants the City's motion for summary judgment on almost every claim:
  - No private cause of action against city for failing to comply with notice requirements of city ordinance
  - Plaintiff failed to timely seek review of city's demolition decision pursuant to TLGC §214.002
  - Property is a public nuisance based upon TLGC §214.001, which defines nuisance as "dilapidated, substandard, or unfit for human habitation"

Amaya v. City of San Antonio

Amaya v. City of San Antonio

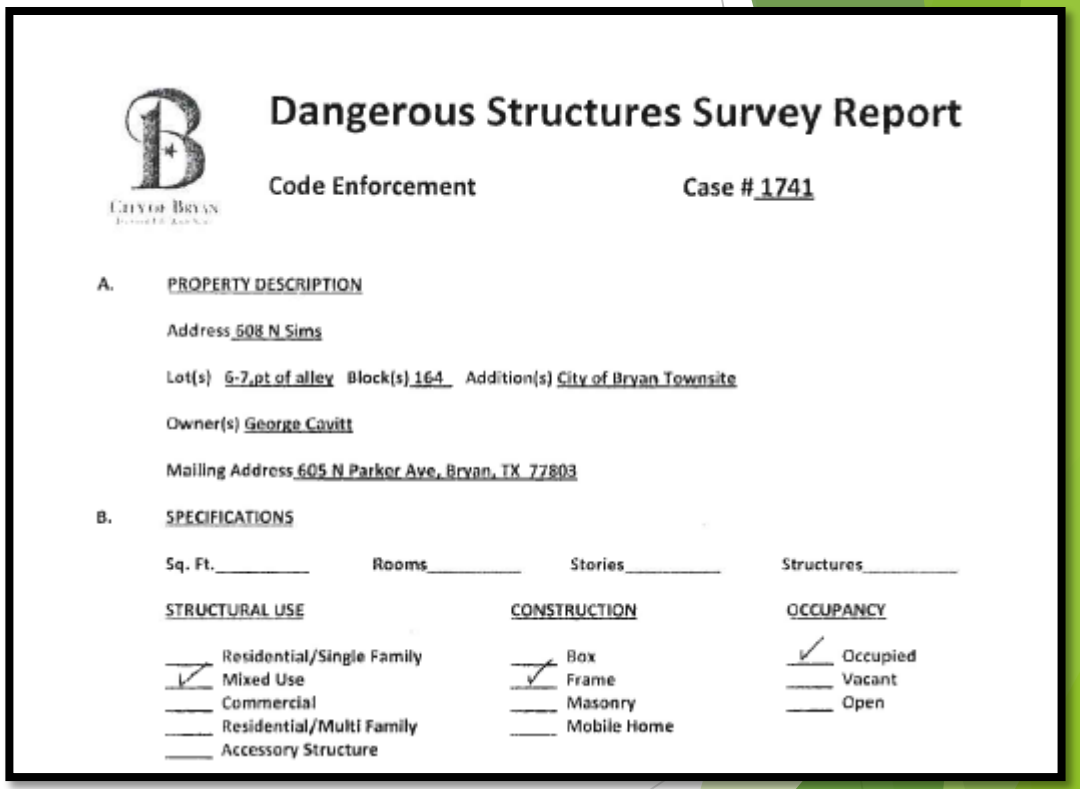
- Plaintiff ordered to replead §1983 claim; city files new MSJ
- District Court distinguishes *Kinnison* because no indication or efforts on plaintiff's part to make repairs and demolition occurred 1 day after imminent danger determination was made
- No due process violation and no constitutional injury that was the result of a municipal policy or custom
- Owner filed appeal to 5th Circuit on January 14, 2015

Immunity, takings claims and Pleas to the Jurisdiction

Adding to the confusion!

City of Bryan/Bldg. & Standards Comm'n v. Cavitt, 2014 WL 1882765 (Tex. App. – Waco 2014, reh'g overruled)

- Owner timely appealed BSC demolition order and asserted takings claim
- City filed plea to the jurisdiction asserting no waiver of immunity for takings claim because property was a nuisance
- After evidentiary hearing on the plea, the trial court denied the city's plea to the jurisdiction and city appealed



Dangerous Structures Survey Report

Code Enforcement **Case # 1741**

A. PROPERTY DESCRIPTION

Address 508 N Sims

Lot(s) 6-7,pt of alley Block(s) 164 Addition(s) City of Bryan Townsite

Owner(s) George Cavitt

Mailing Address 605 N Parker Ave, Bryan, TX 77803

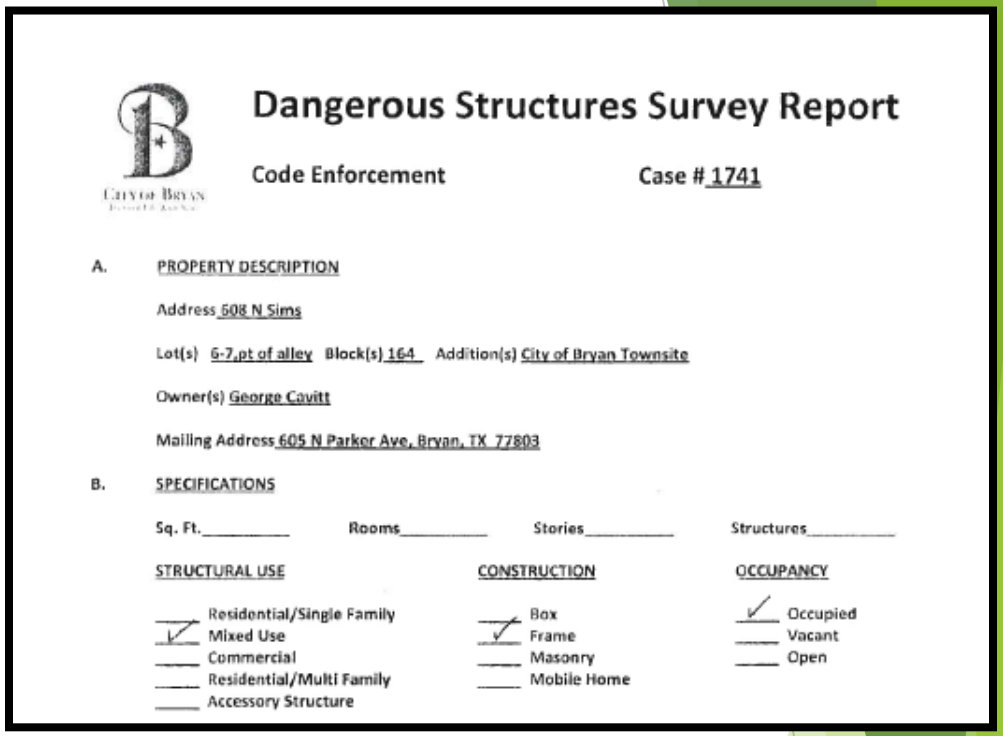
B. SPECIFICATIONS

Sq. Ft._____ Rooms_____ Stories_____ Structures_____

STRUCTURAL USE	CONSTRUCTION	OCCUPANCY
___ Residential/Single Family	___ Box	✓ Occupied
✓ Mixed Use	✓ Frame	___ Vacant
___ Commercial	___ Masonry	___ Open
___ Residential/Multi Family	___ Mobile Home	
___ Accessory Structure		

City of Bryan v. Cavitt

- Court of Appeals says nuisance determination must be made by a court, not administrative body like BSC



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"Because the City's plea sought to prevent appellee from obtaining judicial review of his takings claims by a court, we cannot say that the trial court erred in denying the city's plea to the jurisdiction"

Miscellaneous issues:

Money matters

Do civil penalties assessed by a BSC constitute a taking?????

Gold Feather, Inc. v. City of Farmers Branch, 2014 WL 7399271 (Tex. App. – Dallas 2014, no pet.)

- BSC ordered repair and civil penalties assessed at $500 per day until compliance
- City demanded $22,000 in civil penalties and owner rejected the demand for payment
- City sued for judgment on the civil penalty and moved for SJ
- Trial court granted the City's MSJ and found that the owner failed to timely appeal the final order of the BSC

Gold Feather, Inc. v. City of Farmers Branch

- On appeal, owner for the first time raises issue that the fines levied constituted a taking of property and that the taking was without due process because it was done by a non-judicial body
- Owner precluded from raising takings claim on appeal because it did not exhaust administrative remedies
- Court seems to question in dicta whether a civil penalty amounts to a taking, noting that there is no authority for that proposition

Can the city recover attorney's fees for substandard building cases?

Whallon v. City of Houston, 2015 WL 505429 (Tex. App. – Houston [1st Dist.] Feb. 5, 2015, n.p.h)

- BSC ordered condominium complex to be repaired within 60 days and authorized City to demolish if owners and lienholders did not comply with board's order
- One year later, City filed suit against owners and lienholders of condo buildings seeking demolition pursuant to Chapters 54 and 214 of the TLGC
- Following bench trial, court enters final judgment in favor of city and awarded city demolition costs of $455,000.00 and **attorney's fees of $494,751.00**
- Owners appealed

Whallon v. City of Houston

- Court of Appeals acknowledges that plain language of TLGC §§ 54.039(h) and 214.0012(h) do not support award of attorney's fees because not an appeal of a decision by the commission panel or municipality
- But…Court says attorney's fees are authorized by TLGC § 214.0015(h):
  - "in any judicial proceeding regarding enforcement of municipal rights under this section, the prevailing party is entitled to recover reasonable attorney's fees from the non-prevailing party"
  - IF….a municipality that has adopted an ordinance under TLGC §214.001
    - PRACTICE TIP: make sure you plead Chapter 214, not just Chapter 54, when bringing civil suits on substandard structures

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