Maintenance of City Easements

Generally, a city receives easements, or rights to the use of others' property for limited purposes, from property owners and developers for streets, sidewalks, utilities, and other public rights-of-way. *See, e.g., City of Corpus Christi v. Unitarian Church of Christ of Corpus Christi*, 436 S.W.2d 923, 930 (Tex. Civ. App.—Corpus Christi 1968, writ ref'd n.r.e.). With streets and other dedications, the city does not usually gain ownership of the property itself, but only easements to use the property. The underlying property ownership is usually retained by the property owner who offers the dedication and easement, and the property owner retains a private easement that includes a right of access. *Dykes v. City of Houston*, 406 S.W.2d 176 (Tex. 1966); *State v. Meyer*, 403 S.W.2d 366, 370 (Tex. 1966).

Every city has broad nuisance authority as well as specific weedy lot authority, and many cities regulate the maintenance of city easements on private property, including the abatement of nuisance and weeds, to protect the safe use of the easement by the public. A city's authority to require maintenance of a property owner's land that is subject to an easement includes the ability to abate the nuisance, require abatement by the property owner, charge fines, and charge the property owner for abating the nuisance, such as cutting the grass. TEX. LOC. GOV'T CODE §§ 217.002; 217.022; 217.042; TEX. HEALTH & SAFETY CODE § 342.004.

If a city has an easement, the city has authority to maintain the easement in a way that protects the city's property rights while still allowing some use by the property owner. The easement holder also has the duty to maintain the easement. *Roberts v. Friendswood Dev. Co*., 886 S.W.2d 363, 365 (Tex. App.—Houston [1 Dist.] 1994). Cities, even with their duty to maintain the easement, can require the landowner to maintain the easement because the landowner has a duty to keep his property free from nuisance and in a reasonably safe condition. See, e.g., TEX. LOC. GOV'T CODE ch. 217; TEX. HEALTH & SAFETY CODE § 342.004; *State v. Meyer*, 403 S.W.2d 366 (Tex. 1966). Also, courts have held that the landowner also has his own easement as part of a right of way, which would give the landowner similar obligations to maintain the easement as the city. *See Meyer*, 403 S.W.2d 366. The city can enforce city and state nuisance law and require maintenance on the landowner's property regardless of the presence of a city easement. Also, a general law city can require a landowner to keep "weeds, unclean matter, or trash from the street, sidewalk, or gutter in front of the person's premises." TEX. TRANSP. CODE § 311.003. A city can also require the landowner to keep the sidewalk itself in good repair. *Id.*

In most cases, the city does not perform an unconstitutional taking of the landowner's property by requiring this maintenance. Abating, or requiring the abatement, of a nuisance does not necessarily constitute a taking even if some action is taken and property value could be viewed as diminished. *See Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 670, 672 (Tex. 2004). First, the use of police power, such as nuisance abatement, must follow substantive due process principles and cannot be arbitrary and unreasonable. *City of San Antonio v. TPLP Office Park Prop.*, 218

S.W.3d 60, 64-65 (Tex. 2007). A city's ordinance requiring maintenance will be upheld if there is evidence that the ordinance is reasonably related to a legitimate government interest. *Id.* at 65. In the case of easement maintenance, the ordinance may require mowing of an owner's property, an action which is clearly related to the legitimate public interest of protecting the public's health and welfare. Because requiring the maintenance of a right of way easement is: (1) a reasonable use of police power; (2) does not require the use of property for a public purpose; and (3) does not diminish the value of the property, requiring a landowner to maintain his property is generally not considered a taking.

Occasionally, cities will receive the entire property interest in a street or other right of way as opposed to only receiving an easement, but the city still desires to require the abutting landowner to maintain the right of way. No authority exists under the Health and Safety Code or the Local Government Code for a city to require a property owner to maintain property that does not belong to the person, i.e. city property that is a right-of-way in which the landowner has no property interest. In the Transportation Code, cities are given some authority to charge the cost of streets and sidewalks to the property owners, but requiring property owners to put in sidewalks or streets occurs when the underlying property is still owned by the property owner. *See* TEX. TRANSP. CODE ch. 313. Requiring maintenance of city property may also be hampered by the city's nondelegable duty to maintain streets and by the possibility of unconstitutional takings. *See* TEX. TRANSP. CODE ch. 311; *Weaver v. City of Waco*, 575 S.W.2d 426, 429-30 (Tex. Civ. App.—Waco 1978); *see, e.g., DeSoto Wildwood Dev., Inc. v. City of Lewisville*, 184 S.W.3d 814 (Tex. App.—Fort Worth 2006); *Dolan v. City of Tigard*. 512 U.S. 374 (U.S. 1994).