Legal Q&A
By Scott Houston, TML General Counsel

The Texas Supreme Court recently issued an opinion that has caused much confusion about municipal abatement of substandard structures. The League will conduct an important workshop on this topic on Friday, April 6. This event is currently sold out, but you may add your name to a waiting list by sending an e-mail to acct@tml.org.

In addition, a recording of the workshop will be available for purchase after the event. Watch for more details, which will be sent to all TML member cities soon.

What statutory authority does a city have to abate a substandard structure?

Municipal authority to abate substandard structures comes from several statutory provisions. Essentially, the authority to define and abate a substandard structure stems from Chapter 214 of the Local Government Code, and the process by which it is carried out (with some exceptions) comes from a combined application of Chapters 214 and 54 of the Local Government Code. Historically, cities have used one of three methods for the substandard building abatement process:

1. adopt an ordinance under Chapter 214 relating to the condition of structures in the city, and provide for notice and a public hearing, generally before the city council, an appointed building and standards commission, or the city's municipal court acting in a civil capacity (the council, commission, or municipal court, pursuant to Subchapter C of Chapter 54, acts as the administrative municipal body to carry out the required procedures);
2. bring a civil action under Chapter 54 in district court, county court, or the city's municipal court of record to make a judicial determination that a structure is substandard; or
3. provide for an alternative enforcement process under Section 54.044 by creating an administrative adjudication hearing, under which an administrative penalty may be imposed for the enforcement of a substandard structure ordinance.

How did the Texas Supreme Court's first opinion in *City of Dallas v. Stewart* affect the abatement process?

In *City of Dallas v. Stewart,* the Texas Supreme Court held 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" or "as if the first determination never happened"). No. 09-0257 (Tex. July 1, 2011), available at www.supreme.courts.state.tx.us/opinions/HTMLopinion.asp?OpinionID=2001733. The opinion meant that the administrative determination by city officials (for example, a building and standards commission, a city council, and perhaps even a judge in a municipal court of record) that a building is substandard was no longer entitled to deference by a court.

The lawsuit started when Stewart's house fell into disrepair, had been inhabited by vagrants, and suffered from numerous code 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 district court. The appeal did not stay the demolition, and the house was demolished.

After the demolition, the owner added a takings claim 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 that the demolition resulted in a "taking" by the city of the property, and awarded the owner damages. The city appealed 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" based upon minimum standards that a city adopts in its ordinance. Chapter 214 does not identify a particular administrative municipal body that makes the nuisance determination, but it does authorize the use of a municipal court acting in a civil capacity. 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 as to whether a structure constitutes a public nuisance based upon violation of the city's adopted minimum standards, a decision relating to whether it can be repaired or must be demolished, and 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. However, the Court concluded that the statutory appeal and its substantial evidence standard do not comply with the Texas Constitution's "takings" clause.

The takings clause, found in Article I, Section 17, of the Texas Constitution, provides that the government may not take a person's property without just compensation. The twist in the *Stewart* case is that, in addition to holding that an appointed board's decision is not entitled to deference, the Court also added the requirement that the nuisance determination be made by a judge rather than an appointed administrative body. In other words, the Court held that a city board's decision that a piece of property is a "nuisance" should not be given deference, but can be reviewed *de novo* by a court in a manner similar to eminent domain cases:

> *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.*

The City of Dallas sought a rehearing of the case, and the Texas Municipal League provided amicus support in that effort. In addition, numerous cities and the International Municipal Lawyers Association filed briefs in support of the city.

Did the Texas Supreme Court's second, "substituted" opinion make things any better?

Perhaps. In response to the motion by the City of Dallas for a rehearing (a request that the court reconsider its first opinion), the Texas Supreme Court withdrew its original opinion (meaning that it is no longer legal authority) and substituted a new opinion. *City of Dallas v. Stewart*, No-09-0257, 2012 WL 247966 (Jan. 27, 2012). The Court held essentially the same thing in its second opinion:

> *Today we hold that a system that permits constitutional issues of this importance to be decided by an administrative board, whose decisions are essentially conclusive, does not correctly balance the need to abate nuisances against the rights accorded to property owners under our constitution. In the context of a property owner's appeal of an administrative nuisance determination, independent court review is a constitutional necessity.*
>
> *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.*

Id. at *1. The Court attempted to soften the blow of the case by stating that "property owners rarely invoke the right to appeal." *Id.* at *13. It further stated that "*de novo* review is required only when a nuisance determination is appealed. Thus, the City need not institute court proceedings to abate every nuisance. Rather, the City must defend appeals of nuisance determinations and takings claims asserted in court by property owners who lost before the agency." *Id.* Those things may be true, but they are probably of little comfort to cities that could now incur liability for takings damages when they demolish a substandard building.

The potentially good news in the second opinion is that the Court recognized that Section 214.0012(a) provides a "narrow thirty-day window for seeking review." *Id.* This may mean that a city could continue to use the city council or building and standards commission abatement process and simply wait until the time for appeal has passed before demolishing a structure. However, not all city attorneys are in agreement that such is the case. The questions and answers below explain the processes a city can use in some detail, with analysis of the impact of the *Stewart* case where appropriate.

What procedures must a city follow when using the administrative abatement authority in Chapters 214 and 54?

If a city decides to use its city council, building and standards commission, or municipal court of record to abate substandard structures administratively, it is required to adopt an ordinance requiring the vacation, securing, and demolition of dilapidated structures. TEX. LOCAL GOV'T CODE § 214.001. The ordinance must establish minimum standards for the continued use and occupancy of buildings, provide for the giving of proper notice of a substandard building, and provide for a public hearing. *Id*. (Building codes are often used for the minimum standards required by Chapter 214.) The procedures to use Chapter 214 are as follows:

1. **Identify Substandard Structures Based Upon Minimum Standards**
   Following the adoption of the ordinance, the initial step to demolish a substandard structure is to identify the structure as substandard. A city official (most commonly the building official or code enforcement official) prepares a report stating the structural deficiencies and makes a recommendation as to whether the structure can be repaired or should be demolished.

   The report is submitted to the municipal body designated in the ordinance to conduct a hearing for the purpose of determining whether the structure complies with the minimum standards in the ordinance. (The administrative "municipal body" is usually the city council, a building and standards commission created under Section 54.033 of the Texas Local Government Code, or— in a few cities—the city's municipal court of record acting as a civil court.)

2. **Notice of Public Hearing**
   After the structure has been identified as substandard, the city official who made the determination should issue a notice of public hearing to every known owner, lienholder, or mortgagee of the structure. *See* TEX. LOC. GOV'T CODE § 214.001(d) & (e). The notice should contain the following information:
   a. name and address of the owner of the affected property;
   b. an identification, which is not required to be a legal description (unless the notice is also going to the lienholders and mortgagees), of the structure and the property upon which it is located;
   c. a statement that the official has found the structure to be substandard with a brief and concise description of the conditions found to render the structure substandard;
   d. a statement of the action recommended to be taken, as determined by the official;
   e. a statement that the owner, lienholder, or mortgagee will be required to submit at the hearing proof of the scope of any work that may be required to comply with the ordinance and the time it will take to reasonably perform the work; and
   f. the date, time, place, and brief description of the public hearing.

   The notice should also be filed with the county in order to provide notice to, and be binding upon, subsequent grantees, lienholders or other transferees who acquire an interest in the property after the filing. *Id.* at § 214.001(e).

3. **Public Hearing**
   Once the notice of public hearing has been mailed and all Open Meetings Act posting requirements have been satisfied, the public hearing is held. Prior to opening the public hearing, the municipal body should hear the report detailing the structural deficiencies and recommending that the structure be repaired or demolished. The lienholders, mortgagees, or owners of the property are given an opportunity to be heard and to address the nuisance issues as they relate to the minimum standards, including the scope of the work and financial capability of repairing the structure. The municipal body should then open the public hearing to those who wish to speak on behalf of or against the recommended action. The burden is on the owner, lienholder, or mortgagee to

demonstrate the scope of the work required to comply with the ordinance and the time it will take to perform the work. TEX. LOC. GOV'T CODE § 214.001(l).

4. Determination

After the public hearing, if the structure is found to be in violation of the standards in the ordinance, the municipal body may order the owner, lienholder, or mortgagee to, within 30 days:

a. secure the structure from unauthorized entry. TEX. LOC. GOV'T CODE § 214.0011 (If the city secures the structure prior to a hearing, notice and similar procedures are still required.); or
b. repair, remove, or demolish the structure, unless the owner or lienholder establishes at the hearing that the work cannot reasonably be performed within 30 days. *Id*. at § 214.001(h).

The body may also order that the occupants be relocated within a reasonable time. *Id*. If the municipal body allows the owner, lienholder, or mortgagee more than 30 days to repair, remove, or demolish the building, the body must establish specific time schedules for the commencement and completion of the work and must require that the building be secured to prevent unauthorized entry while the work is being performed. *Id*. at § 214.001(i).

Within ten days after the date that the order to vacate, secure, repair, or demolish the structure is issued, the city must:
a. file a copy of the order in the office of the city secretary; and
b. publish in a newspaper of general circulation in the city a notice containing: (a) the street address or legal description of the property; (b) the date of the hearing; (c) a brief statement indicating the results of the order; and (d) instructions stating where a complete copy of the order may be obtained. *Id*. at § 214.001(f).

Also, after the hearing, the city must promptly send by certified mail, return receipt requested, signature confirmation through United States Postal Service, or personal delivery, a copy of the order to the owner and to any lienholder or mortgagee of the structure, as determined through the use of the city's best efforts. For purposes of this provision, the city has used its best, reasonable, or diligent effort if it has searched the county real property and assumed name records, appraisal district records, records of the secretary of state, and the city's tax and utility records. *Id*. at § 214.001(q). If the notice is mailed, and if the United States Postal Service returns the notice as "refused" or "unclaimed," the notice is deemed delivered. *Id*. at § 214.001(r).

5. Appeal

Chapter 214 provides that any owner, lienholder, or mortgagee of record of a structure for which an order is issued by the municipal body may, within 30 days after the order is mailed to them, appeal the order by filing a verified petition in district court stating that the decision is illegal, either in whole or in part, and specifying the grounds for the illegality. TEX. LOC. GOV'T CODE § 214.0012(a).

The district court may issue a *writ of certiorari* (a legal term for a request for the record of the municipal body) directing the city to review the order and return certified or sworn copies of the papers within a period of time, which must be longer than 10 days. *Id*. at § 214.0012(b) & (c). Upon making the return of the writ, the city is required to concisely set forth verified facts supporting the decision that do not appear in the returned papers. *Id*. at §§ 214.0012(c) & (d). Chapter 214 provides that the district court, upon review of the record under the substantial evidence rule, may either reverse or affirm, in whole or in part, or modify the municipal body's decision. *Id*. at § 214.0012(f). If the decision is affirmed or not substantially reversed but only modified, the district court must award the city all attorney's fees and other costs and expenses incurred by it. *Id*. at § 214.0012(h).

The issue in the *Stewart* case was "whether, in Stewart's takings claim, the [building and standards commission]'s nuisance determination is *res judicata*. That is, should it have been a dispositive affirmative defense to her claim?" *City of Dallas v. Stewart*, at *9. "Res Judicata" is a doctrine that precludes a subsequent claim on a matter that has already been adjudicated, and loosely translates to "a matter already judged." In plain—and perhaps oversimplified—English, the Court concluded that the appeal from a nuisance determination using the substantial evidence rule "does not sufficiently protect a person's rights under [the Takings Clause in] Article I, Section 17 of the Texas Constitution." *Id.* at *2. The substantial evidence rule prohibits a court from substituting its judgment for the judgment of the municipal body on the weight of the evidence. Under that standard, a court would uphold the municipal body's decision if enough evidence suggests the body's determination was within the bounds of reasonableness (for example, if substantial evidence supports the body's determination). The Court held that the standard does not protect a property owner's constitutional rights and that the only way to do so is to allow a judge—by implication, one who is elected—to review the body's decision *de novo*:

> *Accountability is especially weak with regard to municipal-level agencies such as the [building and standard's commission] ….,*
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> ***
> *Our precedents make clear that nuisance determinations must ultimately be made by a court, not an administrative body, when the property owner contests the administrative finding.*

Id. at *8.It appears that, pursuant to the *Stewart* opinion and another opinion (*Patel v. City of Everman*, No-09-0506, 2012 WL 247983 (Jan. 27, 2012).) issued on the same day, an appeal from the decision of the municipal body—including a takings claim as Stewart made—must be raised by a property owner within 30 days of certain city actions. *Id.* at *2. (The appeal petition "must be filed by an owner, lienholder, or mortgagee within 30 calendar days after the respective dates a copy of the final decision of the municipality is personally delivered to them, mailed to them by first class mail with certified return receipt requested, or delivered to them by the United States Postal Service using signature confirmation service, or such decision shall become final as to each of

them upon the expiration of each such 30-calendar-day period.") In *Patel*, the Court stated that:

> *We recently held that a party asserting a taking based on an allegedly improper administrative nuisance determination must appeal that determination and assert his takings claim in that proceeding. See City of Dall. v. Stewart, ___ S.W.3d ___ (Tex. 2012). We noted that "[a]lthough agencies have no power to preempt a court's constitutional construction, a party asserting a taking must first exhaust its administrative remedies and comply with jurisdictional prerequisites for suit." Id. (footnote omitted). We also held that "a litigant must avail [himself] of statutory remedies that may moot [his] takings claim, rather than directly institute a separate proceeding asserting such a claim." Id. (citing City of Dall. v. VSC, 347 S.W.3d 321 (Tex. 2011)).*

Id. Most city attorneys will read the Court's opinions in *Stewart* and *Patel* to collectively mean that a property owner or other aggrieved person must appeal from an administrative decision to demolish a structure within 30 days, and must include in that appeal the takings challenge. The failure to do so should bar a later takings claim. But until an actual challenge occurs, the topic will be hotly-debated.

6. City Action and Liens

The city may vacate, secure, remove, or demolish the structure or relocate the occupants at its own expense if the structure is not vacated, secured, repaired, removed, demolished, or the occupants are not relocated within the allotted time. TEX. LOC. GOV'T CODE § 214.001(m). However, the city may not repair the structure. *Id*. To initiate a proceeding to secure, vacate, remove, or demolish the structure or relocate the occupants, the city must first make diligent efforts to discover each mortgagee and lienholder having an interest in the structure or the property upon which it is located. To save time and expense, the lienholders, mortgagees, and other interested parties should be notified at the time of the initial hearing. *Id*. at § 214.001(e).

All expenses incurred by the city in vacating, securing, removing, or demolishing the structure or relocating the occupants may be assessed and a lien placed on the property upon which the structure is located, *unless the structure is a homestead*. *Id*. at § 214.001(n)(emphasis added). The lien arises and attaches to the property when it is filed with the county clerk. *Id*. It constitutes a "privileged lien" inferior only to tax liens, if mortgagees and lienholders were previously notified as to the result of the city's "diligent effort" to identify these parties. *Id*. at § 214.001(o). The lien is extinguished if the property owner or another party having an interest in the legal title to the property reimburses the city for the expenses incurred. *Id*. at § 214.001(n). In relation to *Stewart*, note that damages awarded under a takings challenge may not be assessed as a lien.

What procedures must a city follow when using the judicial abatement authority in Chapter 54 to bring an action in district or county court?

Rather than hold an administrative hearing under Chapter 214, many cities opt for an alternative provided by Chapter 54 of the Local Government Code. Under Section 54.012, a city may bring a civil action for the enforcement of its ordinances "relating to dangerously damaged or deteriorated structures or improvements."

The jurisdiction and venue of a suit brought pursuant to Section 54.012 are in the district court or the county court at law of the county in which the city bringing the civil action is located. TEX. LOC. GOV'T CODE § 54.013. The Chapter 54 proceeding is the clearest way to comply with *Stewart's* holding that "unelected municipal agencies cannot be effective bulwarks against constitutional violations" because it is brought in district or county court, which are presided over by an elected judge. *Id.* at *13. Of course, the process—like any civil lawsuit—can be lengthy and expensive, and requires the services of an attorney.

1. **Procedure**
   The procedure for filing a civil suit for enforcement of an ordinance is fairly straightforward. The only allegations required to be pleaded in such a civil action are:

   a. the identification of the real property involved in the violation;
   b. the relationship of the defendant to the real property or activity involved in the violation;
   c. a citation to the applicable ordinance;
   d. a description of the violation; and
   e. a statement that Subchapter B of Chapter 54 of the Local Government Code, which contains the provisions concerning civil suits brought by municipalities for the enforcement of ordinances, applies to the violated ordinance.

   TEX. LOC. GOV'T CODE § 54.015. Therefore, in order to properly file a suit for enforcement of the city's ordinances, the city need only file an original petition that: includes the above-mentioned elements; requests that the property owner be served and made to appear before the court; and requests that upon final hearing of the matter, a mandatory injunction be issued compelling the property owner to comply with the city's ordinances or allowing the city to conduct the appropriate abatement.

   Civil suits of this nature can last for months, even years, before a trial. However, a city can seek a "preferential setting" for the suit if it submits to the court a verified motion that includes facts that demonstrate that the delay in deciding the matter will unreasonably endanger persons or property. *Id.* at § 54.014. If the city prevails in the civil action brought for enforcement of its ordinances, it may be entitled to injunctive relief and civil penalties. *See generally, Id.* at §§ 54.016-54.017.

2. **Burden to Establish Entitlement to Injunctive Relief**
   In order to establish its right to injunctive relief in a suit brought for enforcement of an ordinance, a city must show the court that there is a "substantial danger of injury or an adverse health impact to any person or to the property of any person other than the defendant." TEX. LOC. GOV'T CODE § 54.016. If the city makes that showing, it may

obtain against the owner, or owner's representative with control over the premises, an injunction that:

a. prohibits specific conduct that violates the concerned ordinance; and
b. requires specific conduct that is necessary for compliance with the ordinance.

Id. Thus, if the city prevails in a civil action against the property owner for enforcement of the ordinances, the city may be entitled to an injunction that not only requires the property to comply, but may also allow the city to conduct the necessary abatement proceedings. *Id.* at § 54.018 (city may bring action to compel the repair or demolition of a structure or to obtain approval to remove the structure and recover removal costs).

3. Civil Penalty

The city may recover a civil penalty, not to exceed $1,000.00 per day, for a violation of the ordinance, if it proves that the property owner was:

a. actually notified of the provisions of the city's ordinances; and
b. after he received notice of the ordinance provisions, he committed acts in violation of the ordinance or failed to take action necessary for compliance with the ordinance.

TEX. LOC. GOV'T CODE § 54.017. Prior to initiating suit, to invoke the full protection of the law, notice should be sent to the property owner specifically outlining the violations, including the ordinance provisions, with a set number of days for compliance. While civil penalties may be assessed against the property owner, he is not subject to personal attachment or imprisonment for failure to pay such penalties. *Id.* at § 54.019. However, if the penalties are reduced to judgment, the city may attach a lien to the property if it is otherwise unable to recover on the judgment.

What is the authority for a municipal court of record to make a judicial determination that a structure is substandard?

Section 30.00005 of the Government Code grants additional authority to municipal courts of record relative to health and safety and nuisance abatement ordinances. Specifically, a city may, by ordinance, provide that its municipal court of record has civil jurisdiction for purposes of enforcing municipal ordinances enacted under Chapter 214 of the Texas Local Government Code.

The civil authority of municipal courts, found in Section 54.015 of the Local Government Code, is an unclear area of law, and only those cities with judges and city attorneys who are intimately familiar with the area should use them for civil purposes. As stated previously, a municipal court of record can arguably act in a civil capacity to be the municipal body that makes administrative determinations about whether a structure is substandard. To take advantage of the municipal court of record in the administrative process, a city should designate the municipal court of record as the municipal body under Chapter 214 (as opposed to the city council or building and standards commission). TEX. LOC. GOV'T CODE § 214.001(p)(referencing a "civil municipal court" rather than a court of record).

In addition, Section 30.00005 provides that a municipal court of record has concurrent jurisdiction with a district court or county court at law under Subchapter B of Chapter 54 of the Local Government Code within the corporate city limits and the city's extraterritorial jurisdiction for purposes of enforcing health and safety and nuisance abatement ordinances. That means that a city could file a chapter 54 judicial abatement proceeding in a municipal court of record as it could in a district or county court. The *Stewart* problem with filing in a municipal court of record is that judges in that court are not elected. Thus, the decision of the court may not—by itself—satisfy the Texas Supreme Court's edict.

Are there any other lingering issues to be aware of in the substandard structure abatement process?

In 1999, a panel of the Fifth Circuit Court of Appeals ruled in *Freeman v. City of Dallas* that a city must obtain a warrant from a judge or magistrate before a substandard structure may be demolished. *Freeman v. City of Dallas,* 186 F.3d 601 (5th Cir. 1999), *rehearing en banc granted,* 200 F.3d 884 (5th Cir. 2000), *on rehearing,* 242 F.3d 642 (5th Cir. 2001), *cert. denied,* 122 S.Ct. 47 (2001). As a result, many cities opted for a Chapter 54 judicial proceeding rather than seeking relief under Chapter 214, due to the additional warrant requirement.

In a later opinion issued *en banc* (by all of the court's judges rather than a panel), the Fifth Circuit held that the original panel erred, and that the U.S. Constitution does not require a warrant. *Freeman*, 242 F.3d at 644. The court, as a threshold determination, acknowledged that the demolition of a structure constituted a "seizure" of property under the Fourth Amendment. However, the Fourth Amendment does not state that there shall be no seizure without a warrant. Rather, it provides only that there shall be no "unreasonable" searches or seizures. To determine the reasonableness of the seizure, the court examined the procedures under state law and the City of Dallas' ordinances. The court determined that the process, along with the defined standards in the municipal code for finding that a structure is a nuisance, offered greater protection against unreasonable actions than an application for a warrant before a judge (which is usually done without notice to the landowner or the opportunity to participate). *Id*. at 653. Thus, substandard building abatement does not appear to pose a Fourth Amendment problem.

What is the bottom line regarding *Stewart's* effect on the substandard building abatement process?

The bottom line is that it appears that the only way to be certain to "head off" a takings claim after *Stewart* is to seek a decision from a court in which the judge is elected (for example, a county or district court). That means the judicial abatement process under Chapter 54 is the safest, albeit most expensive and time-consuming, route.

Of course, the *Stewart* opinion may be right that "property owners rarely invoke the right to appeal." And, if the court's opinion in the case—read in conjunction with the *Patel* opinion—truly means that an appeal from the decision of an administrative municipal body (for example, the city council, a building and standards commission, or a municipal court acting in a civil

capacity) must be raised by a property owner within 30 days of certain city actions, it may not be as big of a problem as some thought.

Only time will tell. Each city should consult with its city attorney prior to taking action on a substandard building.

Editor's Note: *Much of the information in this Legal Q&A was condensed from a paper written by Bonnie Lee Goldstein, a Dallas-based attorney and judge.*