IN THE SUPREME COURT OF TEXAS

NO. 09-0257

CITY OF DALLAS, PETITIONER,

v.

HEATHER STEWART, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued February 16, 2010

JUSTICE JOHNSON, joined by JUSTICE WAINWRIGHT, JUSTICE GREEN, and JUSTICE GUZMAN, dissenting.

The finding by Dallas's Urban Rehabilitation Standards Board (URSB) that Heather Stewart's property was a nuisance, when affirmed by the trial court, should have determined the nuisance question and precluded its relitigation. Because the Court holds otherwise, I respectfully dissent.

I. General

Statutory requirements afford significant safeguards to property owners whose property a city seeks to abate as a public nuisance. *See* TEX. LOC. GOV'T CODE chs. 54, 214. Stewart does not claim that Dallas's ordinances failed to comply with those requirements; neither does the Court. Stewart simply claims that she is constitutionally entitled to an entirely new consideration of

whether her property was a nuisance—a trial de novo—instead of the consideration by the URSB with judicial review under the substantial evidence standard. The Court agrees; I do not.

A. Law

The statutory framework providing abatement of public nuisances is detailed and comprehensive. The Local Government Code specifies that municipalities may provide for abatement of certain types of buildings:

> (a) A municipality may, by ordinance, require the vacation, relocation of occupants, securing, repair, removal, or demolition of a building that is:
>
> (1) dilapidated, substandard, or unfit for human habitation and a hazard to the public health, safety, and welfare;
>
> (2) regardless of its structural condition, unoccupied by its owners, lessees, or other invitees and is unsecured from unauthorized entry to the extent that it could be entered or used by vagrants or other uninvited persons as a place of harborage or could be entered or used by children; or
>
> (3) boarded up, fenced, or otherwise secured in any manner if:
>
> (A) the building constitutes a danger to the public even though secured from entry; or
>
> (B) the means used to secure the building are inadequate to prevent unauthorized entry or use of the building in the manner described by Subdivision (2).

Id. § 214.001(a). A city governing body is authorized to appoint a building and standards commission to hear cases concerning alleged violations of ordinances. *Id.* § 54.033(a). The commission is afforded independence in fulfilling its functions: members are removable only for cause on written charge and the member is entitled to a public hearing on the removal issue. *Id.* § 544.033(c). The commission must adopt rules and procedures for use in hearings and provide "ample opportunity for presentation of evidence and testimony by respondents or persons opposing charges brought by the municipality or its building officials." *Id.* § 54.034(b), (d). Further, the chair

of the reviewing panel has the authority to administer oaths and compel attendance of witnesses. *Id.* A city may provide that if property is determined by the commission to be in violation of city ordinances and the property is not timely brought into compliance or demolished by the owner, then the property is subject to abatement by the municipality. *Id.* §§ 214.001(d), (h), (i), (j), (m). As relevant to this matter, Dallas's ordinances conformed to the statutory provisions. *E.g.*, DALLAS TEX. CODE §§ 27-6 to -9.[1]

B. The Hearings

Pursuant to the Local Government Code and Dallas's ordinances, the URSB gave Stewart notice of the alleged code violations regarding her property. The URSB then held an evidentiary hearing concerning the allegations that Stewart's house was an urban nuisance.

Dallas's ordinance defined "urban nuisance" as follows:

> URBAN NUISANCE means a premises or structure that is dilapidated, substandard, or unfit for human habitation and a hazard to the public health, safety, and welfare.

DALLAS TEX. CODE § 27-3(24). *See* TEX. LOC. GOV'T CODE § 214.001(a)(1). After hearing evidence on September 24, 2001, the commission found based on a preponderance of the evidence that Stewart's house was an urban nuisance as defined in section 27-3(24) of the Dallas City Code. Stewart did not appear at the hearing, but after the order was entered she requested a rehearing and filed a plan for repairing the house to remedy the specified code violations. The URSB held another hearing on September 23, 2002. The transcript of the second hearing shows that Stewart and her mother appeared and gave testimony contesting the nuisance allegations. The City presented

[1] Some provisions of the Code have been amended. References will be to code language applicable to this matter.

evidence that no substantial repairs had been made to Stewart's property since the first hearing. As a result of the second hearing the URSB affirmed its September 24, 2001 order.

C. The Lawsuits

As she was authorized to do by statute and Dallas's ordinances, Stewart timely appealed to the district court. She made several arguments before the district court, but she did not, at that time, argue review of the URSB's determination under the substantial evidence standard violated her constitutional rights. She alleged that (1) the URSB's decision was not reasonably supported by substantial evidence; (2) the URSB actions denied her "due process of law and the right to equal protection of the law, as guaranteed by the Constitutions of the United States and the State of Texas *in that [Stewart] has not been served an order specifying in detail the findings of the Board*" (emphasis added); (3) the URSB exceeded its statutory authority because it did not apply the correct standards in making its ruling; (4) the procedures of the URSB were unlawful in that Stewart was denied the right to cross-examine a city expert witness and a third party witness; and (5) the URSB ignored the evidence and its decision was arbitrary, capricious, and an abuse of discretion.

After the City demolished the property, Stewart amended her pleadings to allege that (1) the URSB's decision was not reasonably supported by substantial evidence; (2) there were "Errors in Procedure and Due Process as to Order and Demolition" because the URSB did not follow the notice procedures in section 27-13 of Dallas's ordinances before demolishing her property; (3) demolition of her property was wrongful because there was not substantial evidence to support the URSB's order; and (4) the demolition of her property was an unlawful government action, comprising a

"taking" of her property under the Fifth and Fourteenth Amendments of the federal constitution and article 1 of the Texas Constitution, and was "without due process of law."

After the trial court severed the administrative appeal from her other claims, Stewart pled that she was entitled to damages for the wrongful destruction of her property based on "constitutional claims associated with" the City's destruction of her home. As the basis for damages, she alleged generally that demolition of the property as a public nuisance was wrongful, and her claims were brought under "the Texas Constitution, Article 1, Sections 17 and 19." She specified that the bases for her general claim of unconstitutionality were (1) the property was not a nuisance in fact and its destruction "violated the protections afforded Plaintiff by the Texas Constitution and Texas Government Code"; (2) whether her property was a nuisance was a justiciable question to be determined only by the district court or jury trying the case; and (3) Dallas did not give proper notice before demolishing the property, which violated her right to due process. She sought damages for value of the property and mental anguish.

The district court was authorized by statute to conduct a substantial evidence review, and to "reverse or affirm, in whole or in part, or . . . modify the decision brought up for review." TEX. LOC. GOV'T CODE § 214.0012(f). After severing Stewart's appeal of the URSB's order from her constitutional claims, the court affirmed the URSB order without altering or modifying it. Stewart did not appeal that ruling.

In this severed matter the trial court submitted two liability questions and damages questions contingent on "Yes" answers to the liability questions. The first liability question, question one, charged the jury to find from a preponderance of the evidence if Stewart's property constituted a

public nuisance at the time it was demolished by the City. The second liability question, question three, asked if the city failed to comply with section 27-13 of its ordinances in proceeding with the demolition of Stewart's property. Stewart's only objection to the charge was to request that the court define "public nuisance" in question one according to the definition in Dallas's ordinance. The jury answered question one "No" and found the market value of the structure was $75,707.67 at the time it was demolished. Regarding Stewart's due process claim, the jury answered question three "No." Stewart moved the trial court to render judgment in her favor on the verdict of the jury, which it did. Thus, as to the nuisance issue the jury charge submitted the same question to the jury that the URSB previously answered, and the jury made its findings by a preponderance of the evidence—the same standard by which the URSB made its findings.

III. The Court's Holding

The Court recognizes and agrees that the government does not commit a taking when it abates a public nuisance. ___ S.W.3d ___. But the Court allows Stewart to circumvent the URSB's determination that her house was a nuisance and the trial court's affirmation of that determination pursuant to its substantial evidence review despite the fact that Stewart has never directly attacked the validity of either the statutes involved or Dallas's ordinances that (1) define a nuisance, (2) allow determination of the factual nuisance issue by the URSB pursuant to specified procedures and the definition of nuisance prescribed by the Legislature, and (3) provide for substantial evidence review by a trial court that is authorized to reverse or modify the URSB's order in whole or in part. Nevertheless, her position clearly is that they are invalid: "The question as to whether or not [Stewart's] home was a nuisance is a justiciable question to be determined alone by a court or jury

trying the case." Put differently, she maintains that she is entitled to a de novo determination of the nuisance question despite not having challenged the substance of either the statutes or Dallas's ordinances providing procedural and substantive safeguards for persons whose property is alleged to be a nuisance, define the term nuisance, authorize judicial review of the URSB's quasi-judicial nuisance finding and judicial modification of the URSB order.

Stewart and the Court mainly base their positions on *City of Houston v. Lurie*, 224 S.W.2d 871 (Tex. 1949) and several cases preceding *Lurie*: *City of Texarkana v. Reagan*, 247 S.W. 816 (Tex. 1923), *Crossman v. City of Galveston*, 247 S.W. 810 (Tex. 1923), *Stockwell v. State*, 221 S.W. 932 (Tex. 1920). Based on these cases the Court holds that the URSB's determination that Stewart's house was an urban nuisance as defined by the City ordinance—which reflects the statutory definition—could not stand absent "full judicial review." ___ S.W.3d at ___.

In *Lurie*, Aneeth Lurie refused to tear down two buildings she owned after the city council determined the buildings were nuisances. *Lurie*, 224 S.W.2d at 873. An ordinance provided that if an owner failed to comply with an order of the city council, "the city attorney 'shall file suit in the proper court against such owner and obtain the necessary orders and process of said court to enforce the orders of the city council.'" *Id.* The ordinance did not provide for judicial review of the council's determination that a property was a nuisance. Pursuant to the ordinance, the city attorney sued Lurie to enforce the council's order. *Id.* The trial court submitted the issue to the jury, which found only one of the two buildings was a nuisance. *Id.* The trial court granted a JNOV, rendered judgment that both buildings were nuisances, and ordered their demolition. *Id*. The court of appeals reversed for jury charge error. *Id.* In this Court, the City argued that the trial court should not have

even submitted the issues to the jury. *Id.* at 873-74. Rather, it argued the trial court should have rendered judgment for the City, or alternatively, instructed a verdict for the City because it had introduced substantial evidence reasonably supporting the council's findings. *Id.* Relying on *Crossman* and *Reagan*, this Court rejected the City's argument for application of the substantial evidence rule:

> The authority to decide such a question involves the exercise of judicial discretion, and ordinarily includes the authority to weigh evidence, to make findings of fact, and to apply rules of law. It may well be doubted that a limited review of the facts, as under the substantial evidence rule, would amount to a judicial determination of the justiciable question here involved. Trial under that rule would not establish whether or not the buildings are nuisances, "in the same manner as any other fact." *Certainly we would not be justified in applying the substantial evidence rule to this case when there is nothing in the statutes, including the home rule enabling act, or in the city's charter or in the city's ordinance, expressing an intention that the suit be tried under that rule.*

Lurie, 224 S.W.2d at 876 (emphasis added). Thus, the Court's refusal to afford preclusive effect to the council's determination that a property was a nuisance, or to afford substantial evidence review of the council's determination, occurred in the absence of a statute or ordinance providing for substantial evidence review. *Id.*

Similarly, in the cases upon which *Lurie* relied—*Stockwell*, *Crossman*, and *Reagan*—there was no statute or ordinance providing for judicial review. *See Stockwell*, 221 S.W. at 934; *Crossman*, 247 S.W. at 811; *Reagan*, 247 S.W. at 816-17. *Lurie* and its predecessor cases stemmed from the Court's refusal to recognize a non-judicial nuisance finding as conclusive. *See Lurie*, 224 S.W.2d at 875; *see also Reagan*, 247 S.W. at 817 (refusing to uphold an ordinance that "makes final the determination of the city council on the question as to whether or not the building under investigation is a nuisance"); *Crossman*, 247 S.W. at 813 ("Another vice of this ordinance is that

it purports to make the action of the city commissioners, in declaring the building a nuisance, final."). These cases expressed the Court's position that such an approach subjected property rights to disposition by officials "exercising, not judicial powers, but purely executive powers." *Stockwell*, 221 S.W. at 934.

Since those cases were decided, however, the Legislature has enacted statutes authorizing substantial evidence judicial review of similar types of decisions. *See* TEX. LOC. GOV'T CODE § 54.039(f) ("The district court's review shall be limited to a hearing under the substantial evidence rule."); *id.* § 214.0012(f) ("Appeal in the district court shall be limited to a hearing under the substantial evidence rule."). The City of Dallas has incorporated the statutory standard into its ordinance. *See* DALLAS TEX. CODE § 27-9(e). Thus, in the matter before us, unlike the situations in *Lurie*, *Stockwell*, *Crossman*, and *Reagan*, statutes and an ordinance provide a definition of nuisance, procedures for giving notice of and determining whether property falls within the definition of nuisance, judicial review of the nuisance determination, and the standard to be used in any judicial review. *See Cedar Crest # 10, Inc. v. City of Dallas*, 754 S.W.2d 351, 353 (Tex. App.—Eastland 1988, writ denied) (distinguishing *Lurie* on these grounds).

Although the Court recognizes that *Lurie* involved the absence of a statutory basis for substantial evidence review, in a footnote of its opinion the Court concludes that the basis of the Court's holding was not statutory; instead, *Lurie* focused on the special nature of the right being protected. ___ S.W.3d ___ n.15. I agree that the right involved in *Lurie* was special: it was the constitutional right of a private property owner to be secure from governmental taking of private

property without compensation. *See Lurie*, 224 S.W.2d at 874. But the Court subsequently squarely held substantial evidence review valid as applied to this same right.

In *City of Houston v. Blackbird*, 394 S.W.2d 159 (Tex. 1965), the City of Houston passed an ordinance that levied assessments against property owners for improvements made to streets abutting their properties. *Id*. at 161. The amount of the assessments were based on the city council's determination that the property owners would receive special benefits from the proposed improvements. *Id.* The property owners filed suit in district court seeking de novo review of the council's determination that their property would be especially benefitted by the improvements. *Id.* On appeal, this Court concluded that the validity of the amount of the assessments involved the takings clause of the Texas Constitution, yet the property owners were not entitled to de novo review of the council's determinations:

> An assessment against property and its owner for paving improvements on any basis other than for benefits conferred and in an amount materially greater than the benefits conferred, violates Sec. 17 of Article 1 of the Constitution of Texas, which prohibits the taking of private property for public use without just compensation. The right to judicial review of acts of legislative and administrative bodies affecting constitutional or property rights is axiomatic. The City of Houston does not question the verity or soundness of this proposition. *What the City does question is the right of respondents in this case to a full-blown de novo trial of the question of benefits. We agree with the City that respondents had no such right; and, accordingly, we agree with the City that respondents were not entitled to a jury trial of the issues in this case* and that the jury's answers to the special issues submitted to them should have been disregarded.

Id. at 162-63 (emphasis added) (citations omitted). As the Court noted, the Legislature "precluded judicial review of such acts to the extent of its constitutional power" and the Legislature did not intend to provide "dissatisfied property owners a de novo review thereof." *Id.* at 163. The Court

upheld that choice by the Legislature, even though the takings clause was the basis for the property owners' challenge, just as it underlies Stewart's challenge.

Similarly, the Court held in *Brazosport Savings and Loan Ass'n v. American Savings and Loan Ass'n* that parties claiming an agency's decision infringed their vested property rights in franchises had a right to judicial review, but the right was limited to "prov[ing] their allegations that the Commissioner's action was illegal or without support in substantial evidence." 342 S.W.2d 747, 752 (Tex. 1961).

The Court discounts the holdings of *Blackbird* and *Brazosport* by reading them as "due process cases alleging improper agency actions implicating property interests." ___ S.W.3d ___. But in *Blackbird* the Court squarely addressed the issue as one involving the takings clause of the Texas Constitution. *Id.* at 163. The only real distinction between *Blackbird* and *Lurie* is that *Lurie* involved the taking of real property, whereas *Blackbird* involved the taking of money by means of requiring payment of an assessment. But they are both property takings claims, nonetheless. And the result in *Blackbird* depended on the city council's fact-based finding that the abutting landowners' property was especially benefitted by the paving. The Court nevertheless holds that findings of the URSB cannot survive because review was by the substantial evidence standard even though the URSB's decision did not entail interpretation of law or the constitution. And the Court does so despite Stewart's failure to challenge any part of the process provided in Dallas's ordinances as being unconstitutional or violating statutes. Her specific complaint was about the post-hearing, pre-demolition notice required by section 27-13 of Dallas's ordinances, and the jury found against her on that question. She neither complains of how the due process question was submitted to the

jury nor challenges the jury's finding on it. To the contrary, she moved for judgment on the verdict without excepting or excluding the due process finding from her motion.

The Court also states that *Blackbird* and *Brazosport* "both predate our decision in [*Steele v. City of Houston*, 603 S.W.2d 786], which recognized an implied constitutional right of action for takings claims." ___ S.W.3d ___. The Court concludes "*Steele* [] undermined their vitality insofar as they give broad deference to the Legislature's determination of remedial schemes for property rights violations." ___ S.W.3d ___. This statement implies that *Steele* overruled *Brazosport* and *Blackbird*. But *Steele* does not address *Brazosport* and *Blackbird*, nor does it address the Legislature's authorization and establishment of a quasi-judicial process to address public nuisances.

In *Steele*, police sought to flush and capture fugitive prisoners by starting a fire in the house where the fugitives were hiding. 603 S.W.2d at 789. The house burned and the owners sought compensation from the city. *Id.* The case did not involve the propriety of an administrative process involving a limited definition of what comprised a public nuisance and provisions for notice, presentment of evidence, opportunity for rehearing, judicial review of findings and determinations, and even judicial authority to modify the administrative order. *See id.* at 792. Rather, it involved whether the police's burning of the property came within the doctrine of great public necessity. *See id.* ("The defendant City of Houston may defend its actions by proof of a great public necessity."). That doctrine recognizes that a governmental entity may destroy property "[i]n the case of fire, flood, pestilence or other great public calamity, when immediate action is necessary to save human life or to avert an overwhelming destruction of property." *Id.* at 792 n.2.

In contrast to *Steele*, where the question was whether an emergency existed and property was destroyed without prior proceedings to determine the public nuisance question, statutorily authorized abatement proceedings involve quasi-judicial determinations occurring before destruction of the property and affording procedural and substantive safeguards to property owners. *See* TEX. LOC. GOV'T CODE § 54.034. Situations involving determining whether property was previously destroyed because of great public necessity are different from situations involving destruction of property following proceedings pursuant to statutes and ordinances requiring advance notice, a hearing with the opportunity to challenge the public nuisance determination before destruction, and review by a court empowered to set aside or modify the final order. In my view *Steele* is inapposite. *See, e.g.*, *Crossman*, 247 S.W. at 814; *Stockwell,* 221 S.W. at 935. The Court simply displaces a permissible Legislative decision to prescribe a particular type of judicial review and oversight of the determination that property was a nuisance and the administrative remedy.[2] *See* TEX. LOC. GOV'T CODE §§ 54.039(f), 214.0012(f); *Blackbird,* 394 S.W.2d at 162-63; ___ S.W.3d at ___ (Guzman, J., dissenting).

IV. Issue Preclusion

Citing *City of Houston v. Crabb,* 905 S.W.2d 669 (Tex. App.—Houston [14th Dist.] 1995, no writ), the court of appeals held that Stewart was not precluded from asserting a takings claim because the nuisance issues underlying the URSB proceeding and Stewart's takings suit were not

[2] In an effort to undercut the legitimacy of the URSB's determinations, the Court states that abatement proceedings are necessarily motivated in part by the City's bottom line because the URSB's job is to eliminate unsightly conditions adversely affecting the economic value of neighboring property and the City's tax base. ___ S.W.3d ___ n.18. But, to be clear, there is no evidence in the record of any impropriety by the URSB.

identical: the City's nuisance defense required proof "that the demolished structure was a nuisance *on the day* it was demolished," but the URSB "made its nuisance finding over a year before Stewart's house was actually demolished." ___ S.W.3d ___, ___ (emphasis added). But the facts in *Crabb* differ significantly from those before us. In *Crabb* the City of Houston notified Crabb that a building he owned was dangerous and that the City intended to demolish it. *See Crabb*, 905 S.W.2d at 671. Crabb attended a hearing where he maintained that he intended to repair the building and sell the property. *Id.* The City nevertheless issued an order stating that he had to demolish the building or the City would do so. *Id.* One year after the City sent the order to Crabb, a city inspector visited the property and determined that the City should not destroy the structure. *Id.* Crabb then spent $13,000 for repairs to the building, including a new roof, all new walls, and all new fixtures. *Id.* Over a year and a half after the city had first notified Crabb of its intent to do so and after the structure had been repaired, the City unexpectedly demolished it. *Id.* Crabb brought a takings claim and the City argued that its nuisance determination barred his suit. The court of appeals agreed that under the facts Crabb could assert his claim.

Unlike the situation in *Crabb*, the URSB found Stewart's property to be a nuisance in two evidentiary hearings that took place a year apart—the second being a rehearing pursuant to her request. Stewart has never denied adequate notice of both hearings. The transcript of the second hearing shows that Stewart appeared, took part, and even brought a witness who testified on her behalf.

Following its September 2001 hearing, the URSB found by a preponderance of the evidence that Stewart's property was a public nuisance as defined by Dallas's ordinances and the Local

Government Code and rendered an order to that effect. The Board specifically reaffirmed the 2001 findings and order on September 23, 2002—again specifically by a preponderance of the evidence—after hearing evidence from the city inspectors, Stewart, Stewart's mother, and the same neighbor who testified in September 2001. At the second hearing, Stewart did not claim that repairs had been made to the property since the first hearing or that she did not have notice of the specific problems that resulted in the determination that the property was a nuisance. She claimed that she had always intended to repair the property, but the extent to which she carried out that intent was to install a fence that she maintained restricted entry to the property. On September 26, 2002, Stewart received written notice that the City intended to demolish the property; on October 17, 2002, a city inspector re-inspected the property and determined that the code violations had not been corrected; and a week later the City's special-projects manager inspected the property and determined that no repairs had been made. On October 28, 2002, a City magistrate signed a judicial warrant authorizing demolition of the property and the demolition took place on November 1, 2002.

As previously noted, Stewart disputed the City's contention that her property was a nuisance, but she did not claim or offer evidence that there had been a substantial change in her property between the time of the URSB's September 23, 2002 finding that the property continued to be a public nuisance and the property's demolition on November 1, 2002. Nor did she seek a court order—which she could have—directing the City to defer any action until after her appeal was complete.

I would hold that under this record, Stewart's takings claim was barred by the URSB's nuisance finding and the trial court's affirming of it. *See, e.g.*, *Igal v. Brightstar Info. Tech. Grp.*,

Inc., 250 S.W.3d 78, 87 (Tex. 2007) (holding that when the Texas Workforce Commission acted in a judicial capacity in deciding a wage claim, the parties had adequate opportunity to litigate their claims through an adversarial process, and the Commission then decided disputed issues of fact, res judicata will generally apply to the Commission's final orders and bar relitigation of the matters decided); *Eagle Props., Ltd. v. Scharbauer*, 807 S.W.2d 714, 721-22 (Tex. 1990) (stating that the doctrine of issue preclusion bars "the relitigation of identical issues of fact or law which were actually litigated and essential to the prior judgment"); *Humble Oil & Ref. Co. v. Fisher*, 253 S.W.2d 656, 661 (Tex. 1952) (holding that even errors in a previous decision do not "detract from or lessen the conclusive and binding effect of the judgment").

V. Conclusion

I would hold that the process provided to Stewart by the URSB proceedings and appellate review of those proceedings and the URSB's order by the substantial evidence standard was sufficient. In this regard I join Justice Guzman's dissent.

I would reverse the judgment of the court of appeals and render judgment that Stewart take nothing.

Phil Johnson
Justice

OPINION DELIVERED: July 1, 2011