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

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court, joined by JUSTICE HECHT, JUSTICE MEDINA, JUSTICE WILLETT, and JUSTICE LEHRMANN.

JUSTICE JOHNSON delivered a dissenting opinion, joined by JUSTICE WAINWRIGHT, JUSTICE GREEN, and JUSTICE GUZMAN.

JUSTICE GUZMAN delivered a dissenting opinion, joined by JUSTICE WAINWRIGHT, JUSTICE GREEN, and JUSTICE JOHNSON.

We deny the motion for rehearing. We withdraw our opinion of July 1, 2011 and substitute the following in its place.

Urban blight threatens neighborhoods. Either as a risk to public health or as a base for illicit activity, dilapidated structures harm property values far more than their numbers suggest. Cities

must be able to abate[1] these nuisances to avoid disease and deter crime. But when the government sets up a mechanism to deal with this very real problem, it must nonetheless comply with constitutional mandates that protect a citizen's right to her property.

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. We affirm the court of appeals' judgment, but on different grounds.

I. Background

Heather Stewart bought a home in Dallas. Between 1991, when Stewart abandoned her house, and 2002, when the City demolished it, the Stewart home was a regular stop for Dallas Code Enforcement officials. Although utilities were disconnected and windows boarded up, the home suffered vandalism in 1997 and was occasionally occupied by vagrants. Stewart did little to improve the property, apart from building a fence to impede access, and she consistently ignored notices from the City. Inspectors returning to the home often found old notices left on the door.

In September 2001, the Dallas Urban Rehabilitation Standards Board ("URSB" or "Board"), a thirty-member administrative body that enforces municipal zoning ordinances, met to decide whether Stewart's property was an urban nuisance that should be abated. Stewart's neighbor, who

[1] In the context of nuisance law, "abate" means to "eliminat[e] or nullify[]." BLACK'S LAW DICTIONARY 3 (9th ed. 2009). Municipalities have, within their police powers, authority to abate nuisances, including the power to do so permanently through demolition. *See Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 286-87 (Tex. 2004).

had registered complaints on six prior occasions, testified that a fallen tree on Stewart's property had done $8,000 damage to her home and threatened to do $30,000 more. The Board reviewed prior complaints about the property and its general disrepair, found the Stewart house to be an urban nuisance, and ordered its demolition. In September 2002, the Board denied Stewart's request for rehearing and affirmed its order.

On October 17, 2002, a City inspector found that Stewart had not repaired the property, and on October 28, the City obtained a judicial demolition warrant. The City demolished the house four days later.

Before the demolition, Stewart appealed the Board's decision to district court, but the appeal did not stay the demolition order. *See* TEX. LOC. GOV'T CODE § 54.039(e). After the demolition, Stewart amended her complaint to include a due process claim and a claim for an unconstitutional taking. The trial court, on substantial evidence review, affirmed the Board's finding that Stewart's home was an urban nuisance and awarded the city $2,266.28 in attorneys fees. It then severed Stewart's constitutional claims and tried them to a jury. At the close of trial, the City moved unsuccessfully for a directed verdict on the grounds that the Board's nuisance determination was res judicata, precluding Stewart's takings claim. The jury rejected the City's contention that Stewart's home was a public nuisance and awarded her $75,707.67 for the destruction of her house.[2] The trial court denied the City's post-verdict motions and signed a judgment in conformance with the verdict.

[2] The trial court instructed the jury that, in determining whether Stewart's property was a nuisance in the context of her takings claim, it could consider prior administrative and judicial findings.

The court of appeals affirmed but held that the Board's nuisance finding could not be preclusive because of the brief delay between the nuisance finding and the house's demolition. ___ S.W.3d at ___.[3] The City petitioned this Court for review, arguing that the lower courts erred in failing to give the Board's nuisance determination preclusive effect in Stewart's taking claim. We granted the petition for review.[4] 53 Tex. Sup. Ct. J. 115 (Nov. 20, 2009).

II. Analysis

Texas law permits municipalities to establish commissions to consider violations of ordinances related to public safety. *See* TEX. LOC. GOV'T CODE §§ 54.032-.041; *see also id.* §§ 214.001-.012.[5] The City of Dallas created the now-defunct Urban Rehabilitation Standards Board for that purpose. *See* DALLAS, TEX., CODE §§ 27-6 to -9, *repealed by* Dallas, Tex., Ordinance 26455 (Sept. 27, 2006).[6] The Board evaluated alleged violations of municipal ordinances. DALLAS, TEX., CODE §§ 27-6(a), 27-7, 27-8. Before issuing a demolition order, the Board was required to give property owners notice and a hearing. *See id.* §§ 27-9, 27-13. Property owners were also

[3] This holding was based on *City of Houston v. Crabb*, 905 S.W.2d 669, 674 (Tex.App.—Houston [14th Dist.] 1995, no writ), which held that in order to demolish a building as a nuisance, a City must prove that it was a nuisance on the day of demolition.

[4] The cities of Houston and San Antonio submitted a brief as amicus curiae in support of the City, as did the cities of Aledo, Granbury, Haltom City, Kennedale, Lake Worth, North Richland Hills, River Oaks, Saginaw, and Southlake. We also called for the views of the Solicitor General, who submitted a brief on behalf of the State of Texas as amicus curiae.

[5] Chapters 54 and 214 of the Local Government Code provide substantially similar authority to municipalities with regard to the regulation and abatement of urban nuisances.

[6] This repealing ordinance abolished the URSB, replacing it with a system wherein municipal judges make the initial nuisance determination subject to substantial evidence review in district court. *See* DALLAS, TEX., CODE §§ 27-16.3, 27-16.10. However, the Dallas Code still contains language permitting administrative nuisance determinations reviewable only under a substantial evidence standard. *Id.* § 27-16.20.

entitled to an appeal in district court, but judicial review was limited to deciding whether substantial evidence supported the Board's decision. *Id.* § 27-9(e).

The Local Government Code authorizes substantial evidence review of standards commissions' decisions. TEX. LOC. GOV'T CODE §§ 54.039(f), 214.0012(f). The same standard governs review of State agency determinations under the Texas Administrative Procedure Act. *See* TEX. GOV'T CODE §§ 2001.174-.175 ("If the law authorizes review of a decision in a contested case under the substantial evidence rule *or if the law does not define the scope of judicial review*, a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence . . . ." (emphasis added)). Substantial evidence review is limited in that it requires "'only more than a mere scintilla,' to support an agency's determination." *Montgomery Indep. Sch. Dist. v. Davis*, 34 S.W.3d 559, 566 (Tex. 2000) (quoting *R.R. Comm'n v. Torch Operating Co.*, 912 S.W.2d 790, 792-93 (Tex. 1995)); *see also* W. Wendell Hall, *Standards of Review in Texas*, 38 ST. MARY'S L.J. 47, 290-92 (2006) (describing substantial evidence review as applied to Texas administrative agencies). Substantial evidence review "gives significant deference to the agency" and "does not allow a court to substitute its judgment for that of the agency." *Torch Operating*, 912 S.W.2d at 792. As such, "the evidence in the record actually may preponderate against the decision of the agency and nonetheless amount to substantial evidence." *Tex. Health Facilities Comm'n v. Charter Med.-Dallas, Inc.*, 665 S.W.2d 446, 452 (Tex. 1984).

As a general matter, we have held that some agency determinations are entitled to preclusive effect in subsequent litigation. *See, e.g., Igal v. Brightstar Info. Tech. Grp., Inc.*, 250 S.W.3d 78 (Tex. 2007) (applying res judicata to orders of the Texas Workforce Commission). Today, we must

decide whether the Board's determination that Stewart's house was an urban nuisance,[7] and the affirmance of that decision on substantial evidence review, precludes a takings claim based on the demolition of that property. Because 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, we hold that the determination was not preclusive.

A. Eminent Domain and Inverse Condemnation

A city may not take a person's property without first paying just compensation. TEX. CONST. art. I, § 17(d).[8] Typically, when the government takes a person's property, it does so through condemnation proceedings. For more than 150 years, the Legislature has prescribed a thorough and consistent condemnation procedure. A district court appoints a board of commissioners to hear evidence about the public's need for the land and its value.[9] The board's decision is then subject to de novo review by the district court. An early statute, passed before the ratification of the present constitution, provided that

> if either party be dissatisfied with the decision of said Commissioners, he or they shall have the right to file a petition in the District Court, as in ordinary cases,

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[7] The Dallas Municipal Code defines an urban nuisance as "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). This language comes directly from statute. *See* TEX. LOC. GOV'T CODE § 214.001(a)(1); *see also id.* § 54.012 ("A municipality may bring a civil action for the enforcement of an ordinance . . . for the preservation of public safety . . . [or] relating to the preservation of public health . . . .").

[8] Takings without just compensation are also prohibited by the United States Constitution. *See* U.S. CONST. amends. V, XIV. However, that constitution has no requirement of prepayment of compensation. *See Ruckelshaus v. Monsanto*, 467 U.S. 986, 1016 (1984) ("The Fifth Amendment does not require that compensation precede the taking.").

[9] Like building standards commissions, the board of commissioners in a condemnation suit need not be made up of lawyers. *See* TEX. PROP. CODE § 21.014 (requiring that the commissioners in a condemnation suit need only be "disinterested freeholders who reside in the county"); TEX. LOC. GOV'T CODE § 54.033 (setting no requirements for members of building standards commissions).

> reciting the cause of action and the failure to agree, and *such suit shall proceed to judgment as in ordinary cases.*

Act approved Feb. 8, 1860, 8th Leg., R.S., ch. 51, § 2, 1860 Tex. Gen. Laws 60, 61, *reprinted in 4 H.P.N. Gammel, The Laws of Texas 1822-1897*, at 1422, 1423 (Austin, Gammel Book Co. 1898) (emphasis added).[10] An almost identical judicial review provision appeared in the first Revised Civil Statutes. *See* TEX. REV. CIV. STAT. art. 4202 (1879). Today, condemnation proceedings are governed by chapter 21 of the Property Code, which retains the right to de novo review of the lay board's valuation decision. *See* TEX. PROP. CODE § 21.018 (If there is objection to the commissioners' decision, the district court shall "try the case in the same manner as other civil cases.").

Frequently, however, the government takes property without first following eminent domain procedures. In these cases, Texas law permits inverse condemnation suits, which are actions commenced by the landowner seeking compensation for the government's taking or damaging of his or her property through means other than formal condemnation. *See, e.g.*, *City of Houston v. Trail Enters., Inc.*, 300 S.W.3d 736 (Tex. 2009). While these cases are initiated by the landowner rather than the State, they are substantially similar to condemnation suits in most other ways. *See* John T. Cabaniss, *Inverse Condemnation in Texas—Exploring the Serbonian Bog*, 44 TEX. L. REV.

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[10] This statute, however, did not govern all early condemnation cases. The State frequently gave railroad companies eminent domain powers. *See* Eugene O. Porter, *Railroad Enterprises in the Republic of Texas*, 59 SW. HIST. Q. 363 (1956) (describing the charters and eminent domain powers of early Texas railroad companies); Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789-1910*, 33 J. ECON. HIST. 232, 237 (1973) ("Devolution of the eminent-domain power upon . . . railroad companies was done in every state."). In some cases, the charters of these individual railroad companies prescribed somewhat different procedures than were found in the general statutes. *See, e.g.*, *Buffalo Bayou, Brazos & Colo. R.R. Co. v. Ferris*, 26 Tex. 588 (1863); *see also Sabine River Auth. v. McNatt*, 342 S.W.2d 741, 746 (Tex. 1961) (upholding, against a constitutional challenge, a condemnation statute that permitted only judicial review de novo without a jury).

1584, 1585 n.3 (1966) (While the parties are reversed, "[t]he rules of evidence and measure of damages . . . are much the same.").

Our earliest cases gave the Legislature extensive leeway in defining the remedies for a taking. In *Buffalo Bayou*, we held that

> [i]t cannot . . . be maintained, as is insisted, that the manner of ascertaining and assessing the amount of compensation . . . , as prescribed by the act of the legislature granting appellants their charter, is unconstitutional, because it does not require or authorize such compensation to be determined by the findings of a jury. . . . [T]he constitution does not prescribe a rule for determining what constitutes adequate compensation. It may be done in any manner that the legislature in its discretion may prescribe . . . .

26 Tex. at 599. This decision, however, came at a time when sovereign immunity was thought to apply even to takings claims. *See Ex parte Towles*, 48 Tex. 413, 447-48 (1878) (Gould, J., dissenting) (noting that the Legislature had assumed, and the Court had recognized, the State's sovereign immunity from inverse condemnation suits). Moreover, at the time of *Buffalo Bayou*, the Takings Clause of the Texas Constitution was generally thought not to be self-executing. *See* Cabaniss, 44 TEX. L. REV. at 1586-87 & n.16.

Our decision in *Steele v. City of Houston*, 603 S.W.2d 786 (Tex. 1980), brought significant change to this area of law. In *Steele*, the Houston Police Department, attempting to apprehend escaped fugitives who had taken refuge in Steele's property without his knowledge, destroyed his property. *Steele*, 603 S.W.2d at 789. When Steele sued the City under the Takings Clause, the City moved for summary judgment on the basis of its immunity from suit. *Id.* at 788. The trial court granted summary judgment and the court of civil appeals affirmed. *Id.* Reversing, we wrote:

> It is our opinion that plaintiffs' pleadings and their claim in contesting the motion for summary judgment established a lawful cause of action under [the Takings Clause]. That claim was made *under the authority of the Constitution* and was not grounded upon proof of either tort or a nuisance. It was a claim for the destruction of property, and governmental immunity does not shield the City of Houston. *The Constitution itself is the authorization for compensation for the destruction of property and is a waiver of governmental immunity for the taking, damaging or destruction of property for public use.*

Id. at 791 (emphasis added). *Steele* recognized that the Takings Clause is self-executing—that it alone authorizes suit, regardless of whether the Legislature has statutorily provided for it. *See id.* Takings suits are thus, fundamentally, *constitutional* suits and must ultimately be decided by a court rather than an agency. Agencies, we have held, lack the ultimate power of constitutional construction. *See Central Power & Light Co. v. Sharp*, 960 S.W.2d 617, 618 (Tex. 1997) (holding that constitutional claims need not be brought before an agency because "the agency lacks the authority to decide [those] issue[s]"); 1 RONALD L. BEAL, TEXAS ADMINISTRATIVE PROCEDURE & PRACTICE § 9.3.1[c] (2011) ("No Texas agency has been granted the power to engage in constitutional construction, and any such attempt by the legislature to vest such power would raise serious and grave issues of a separation of powers violation."); *but cf.* TEX. CONST. art. XVI, § 50(u).

Texas has generally recognized this rule. Agency findings in eminent domain cases are subject to de novo trial court review, and inverse condemnation plaintiffs bring their cases in the same manner as any other civil case. The City and the dissents urge us to insulate one type of takings claim from the protections of *Steele*: those in which an agency has first declared the

property a nuisance. We do not believe, however, that this matter of constitutional right may finally rest with a panel of citizens untrained in constitutional law.

B. The Police Power and Nuisance Abatement

A maxim of takings jurisprudence holds that "all property is held subject to the valid exercise of the police power." *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 804 (Tex. 1984) (citing *Lombardo v. City of Dallas*, 73 S.W.2d 475, 478 (Tex. 1934)). Based on this principle, we have long held that the government commits no taking when it abates what is, in fact, a public nuisance. *See City of Texarkana v. Reagan*, 247 S.W. 816, 817 (Tex. 1923). Nuisance determinations are typically dispositive in takings cases.[11] Indeed, that was the case here: except for damages, the only relevant question for the jury was whether Stewart's home constituted a public nuisance.

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. *See City of Houston v. Lurie*, 224 S.W.2d 871 (Tex. 1949); *City of Texarkana v. Reagan*, 247 S.W.816 (Tex. 1923); *Crossman v. City of Galveseton*, 247 S.W. 810 (Tex. 1923); *Stockwell v. State*, 221 S.W. 932

[11] *See, e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) (noting that a claimant cannot recover under a regulatory takings theory if state law would have deemed the claimant's activities a public nuisance); *Vulcan Materials Co. v. City of Tehuacana*, 369 F.3d 882, 893-94 (5th Cir. 2004) (finding that the *Lucas* rule applies under Texas law); *RBIII, L.P. v. City of San Antonio*, No. SA-09-CV-119-XR, 2010 U.S. Dist. LEXIS 91751, at *42 (W.D. Tex. Sept. 3, 2010) (applying *Vulcan* and *Lucas*); *City of Texarkana v. Reagan*, 247 S.W. 816, 817 (Tex. 1923) (noting that a showing that a structure was in fact a nuisance would be a valid defense to a suit for damages based on an allegedly improper demolition of the structure); *City of Dallas v. Wilson*, 602 S.W.2d 113, 115 (Tex.App.—Dallas 1980, no writ) (same); *Jones v. City of Odessa*, 574 S.W.2d 850, 853 (Tex.App—El Paso 1978, writ ref'd n.r.e.) (same).

(Tex. 1920).[12] In *Stockwell*, a statute empowered the Commissioner of Agriculture to abate as nuisances any trees infested with an "injurious insect" or a "contagious disease of citrus fruits." *See Stockwell*, 221 S.W. at 934. The Commissioner exercised this legislatively granted discretion and ordered Stockwell's hedges destroyed because they were infested with citrus canker, which the Commissioner determined fit the statutory definition. *Id.* We held that a court must ultimately pass on that determination, noting that "whether something not defined as a public nuisance by the statute is such under its general terms, is undoubtedly a judicial question." *Id.* at 934.

Stewart's home was declared an urban nuisance according to similarly broad terms. The Local Government Code's nuisance definition prohibits buildings that are "dilapidated," "substandard," or "unfit for human habitation." TEX. LOC. GOV'T CODE § 214.001(a)(1). Like the application of the phrase "contagious disease of citrus fruits," these terms require more than rote application by an agency; they require an assessment of whether the particular conditions—citrus canker in one case, foundation damage in another—meet the general statutory terms. Judicial review in nuisance cases requires the application of general statutes to specific facts.[13] *See*

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[12] JUSTICE GUZMAN casts these opinions narrowly to create a "general rule" that would never apply in practice. She would hold that de novo review is required only where the agency acts without a statutory nuisance definition or a statute requiring substantial evidence review. The Legislature has defined nuisance, *see* TEX. LOC. GOV'T CODE § 214.001, and it has required substantial evidence review for boards like the URSB specifically, *id.* § 214.0012(f), and for review of agency decisions generally, *see* TEX. GOV'T CODE § 2001.175(a). The Legislature has, therefore, evaded JUSTICE GUZMAN's "general rule," which would be unlikely ever to apply again.

Moreover, these cases stand for a broader proposition. In each case, there was statutory authorization for the nuisance finding, and substantial evidence review was already considered the default standard. What these cases in fact stand for, then, is that a court, not an administrative agency, must apply statutory nuisance standards to the facts of a particular case.

[13] The statute at issue in *Stockwell* did specifically permit the abatement of trees infected with, e.g., "nematode galls" or "crown galls." *See Stockwell v. State*, 221 S.W. 932, 934 (Tex. 1920). Implicit in the opinion is a suggestion that, had the Commissioner abated trees infected with such diseases, judicial review would be unnecessary because there would have been no application of law to fact—merely rote application of statutory command. But, where the statutory

Stockwell, 221 S.W. at 935 (quoting COOLEY'S CONSTITUTIONAL LIMITATIONS 742 ("Whether any particular thing or act is or is not permitted by the law of the State must always be a judicial question, and therefore the question of what is and what is not a public nuisance must be judicial, and it is not competent to delegate it to the local legislative or administrative boards.")).

We adopted this view of *Stockwell* in *Crossman*, writing that *Stockwell* refused to "sustain the validity of [a] statute, in so far as its effect was to deny a hearing before the courts on the question as to whether or not the particular trees involved constituted a nuisance which ought to be summarily destroyed." *Crossman*, 247 S.W. at 813. That is, judicial review was necessary in *Stockwell* because a general statutory term had to be applied to specific facts. We wrote:

> A wooden building . . . is not a nuisance per se. It can only become a nuisance by the use to which it is put or the state of repair in which it is maintained; but as to whether or not it is, even in these events, a nuisance *is a justiciable question, determinable only by a court of competent jurisdiction.*

Id. at 813 (emphasis added). To read this as negating a property owner's right to full judicial review is to reject the opinion's clear language.

Reagan is particularly on point. There, a statute in the form of the City's charter gave the City the power to abate "dilapidated" buildings as nuisances, and the City destroyed Reagan's property pursuant to this authority. The district court concluded that the City's determination was res judicata. We disagreed, holding that *a court* must determine whether a building is "in fact" a nuisance:

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term was more general, and the agency therefore had discretionary power, review was necessary. There is, of course, no suggestion that this is based on either the lack of a statutory definition—there is one—or the failure to prescribe a standard of review.

> [N]either the Legislature nor the City Council can by a declaration make that a nuisance which is not in fact a nuisance; and *the question as to whether or not the building here involved was a nuisance was a justiciable question, determinable alone by the court or jury trying the case*.

Reagan, 247 S.W. at 817 (emphasis added). JUSTICE GUZMAN suggests that the problem in *Reagan* was that the statute was not "circumscribed to specific conditions that constitute a nuisance in fact" but rather authorized abatement of buildings for merely being dilapidated. ___ S.W.3d at ___ & n.7. But the statute at issue in this case *also* authorizes abatement of buildings for merely being dilapidated. *See* TEX. LOC. GOV'T CODE § 214.001(a)(1) (providing that a "municipality may, by ordinance, require the . . . demolition of a building that is . . . dilapidated"). Thus, the standards for demolition are the same,[14] and, as in *Reagan*, an aggrieved property owner is entitled to judicial review.

Finally, in *Lurie*, we stated that "[i]t has been repeatedly held that the question whether property is a public nuisance and may be condemned as such is a justiciable question to be determined by a court." *Lurie*, 224 S.W.2d at 874. We referred to the "important principle" announced by *Stockwell*, *Crossman*, and *Reagan* that "the property owner is not to be deprived of his right to a judicial determination of the question whether his property is a public nuisance to be

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[14] Cities are by statute permitted to demolish buildings that are, *inter alia*, "dilapidated, substandard, or unfit for human habitation and a hazard to the public health, safety, and welfare." TEX. LOC. GOV'T CODE § 214.001(a)(1). JUSTICE GUZMAN contends that the phrase "hazard to the public health, safety, and welfare" limits the word "dilapidated" and that, therefore, the statute only permits the demolition of nuisances in fact. This reading strain's the sentence's grammar and apparent meaning. The language after the word "or" constitutes a single phrase permitting abatement of buildings that are "unfit for human habitation and a hazard to the public health, safety, and welfare." Dilapidation and failure to comply with building standards are separate bases for abatement. This reading comports with the doctrine of last antecedent, which suggests that in most cases, a qualifying phrase should be applied only to the portion of the sentence "immediately preceding it." *See Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000).

Moreover, even if the final phrase did modify "dilapidated," that would not transform all URSB findings into findings that a property was, in fact, a nuisance "in fact." The Local Government Code's "hazard" language is exactly the same sort of "general term" that we said in *Stockwell* must be found by a court.

abated by demolition." *Id.* at 875. Rather than give *Lurie* and its antecedents a needlessly narrow cast, we should take their broad statements of principle at face value.[15]

The City doubts *Lurie*'s continuing validity, relying on two cases from this Court which, it says, undermine the notion that a claim under the Takings Clause necessitates de novo trial court review. In *Brazosport Savings & Loan Ass'n v. American Savings & Loan Ass'n*, we held that substantial evidence review was appropriate where the plaintiff asserted that the State's issuance of a charter to a third party infringed on the plaintiff's due process property rights. 342 S.W.2d 747, 752 (Tex. 1961). Then, in *City of Houston v. Blackbird*, we held that there was no right to a de novo trial after the city council had levied assessments against landowners' property for the costs of paving improvements. 394 S.W.2d 159, 162-63 (Tex. 1965). Both cases are distinguishable.

Neither *Brazosport* nor *Blackbird* concerns nuisance determinations, and thus each says little about *Lurie*'s specific holding. Moreover, both predate our decision in *Steele*, which recognized an implied constitutional right of action for takings claims. *Steele*, then, undermined their vitality insofar as they give broad deference to the Legislature's determinations of remedial schemes for property rights violations. Finally, and most fundamentally, *Blackbird* and *Brazosport* do not concern agency decisions that directly determine substantive constitutional rights. Rather, they are due process cases alleging improper agency actions implicating property interests. *See Blackbird*,

[15] We should also recognize *Lurie*'s language about the lack of statutory authorization for substantial evidence review for what it was: bolstering. *See City of Houston v. Lurie*, 224 S.W.2d 871, 876 (Tex. 1949) ("Certainly we would not be justified in applying the substantial evidence rule to this case when there is nothing in the statutes . . . expressing an intention that the suit be tried under [the substantial evidence] rule."). Earlier in the opinion, we noted that in other circumstances substantial evidence was the default standard in the absence of express legislative guidance. *Id.* at 874. But, because of the special nature of the right in question, we refused to apply that default presumption. *Id.* Nothing in *Lurie* suggests that our conclusion would have been different had the Legislature expressly required substantial evidence review. To the contrary, the opinion's other language—its language of principle—suggests the opposite result.

394 S.W.2d at 161 (petitioners arguing that Houston did not follow the law in levying assessments against their property); *Brazosport*, 342 S.W.2d at 749 (respondent arguing that the agency acted "contrary to law and . . . rules"). *Blackbird* and *Brazosport* hold that in such cases, due process requires a right of appeal but note that substantial evidence review will usually be sufficient. *See Blackbird*, 394 S.W.2d at 163 (holding that agency action levying property assessments may only be overturned because it is "arbitrary or [is] the result of fraud"); *Brazosport*, 342 S.W.2d at 751 (holding that due process requires "a right of judicial review" where agency action affects property rights). So long as the agency complies with the requirements of due process, its substantive decision does not directly adjudicate a constitutional claim.

In *Blackbird*, for example, the Court made clear that a city has the power to assess property owners for improvements to their properties, but noted that an improperly supported assessment may run afoul of the Texas Constitution. *Blackbird*, 394 S.W.2d at 162. To the extent the Court held that the case implicated the Takings Clause, it was because of a belief that an improper assessment might constitute a taking. *Id.* The suit in *Blackbird* was thus not a takings suit but, instead, was a statutory suit contesting the assessments' grounds. *See id.* at 160. It alleged that the agency failed to follow the law, a violation of due process. *See, e.g.*, *Bennett v. Reynolds*, 315 S.W.3d 867, 873 (Tex. 2010) (noting that arbitrary deprivations of property are violations of due process); *Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 446 (Tex. 2007) ("Due process requires that the application of Texas law be neither arbitrary nor fundamentally unfair."). This differs significantly from Stewart's takings suit, which deals with whether her property was taken without just compensation. For these reasons, the cases cited by the City do not displace our holding in *Lurie*. *See Sheffield Dev. Co., Inc.*

v. City of Glenn Heights, 140 S.W.3d 660, 674 (Tex. 2004) ("Prior decisions need not be reaffirmed periodically to retain authority.").

The City also relies on two federal cases for the proposition that *Lurie* has been undermined by the rise of the administrative state. *See Freeman v. City of Dallas*, 242 F.3d 642, 649 (5th Cir. 2001) (en banc) (suggesting that plenary court review of nuisance determinations is "fundamentally at odds with the development of governmental administrative agencies"); *Traylor v. City of Amarillo*, 492 F.2d 1156, 1158 (5th Cir. 1974) (suggesting that *Crossman* was "decided at a time when the constitutional basis for public regulatory powers was more primitive" (internal quotations omitted)). However, neither of these cases squarely addresses the issue currently before us, and neither directly addresses *Lurie* at all. *Traylor* was a case about whether a judicial nuisance determination must precede a property's demolition, not about judicial review of such determinations.

Freeman, too, is not directly on point. In *Freeman*, the petitioners, whose property was demolished, did not seek judicial review of the URSB's decision, and so the scope of that review was not at issue. *Freeman*, 242 F.3d at 646-47. Rather, *Freeman* considered whether the Fourth Amendment requires that a judicial warrant precede the permanent abatement of a nuisance. *Id.* at 647. *Freeman* cited our cases only to reject an analogy, apparently raised by the petitioners, between warrant requirements and judicial review of nuisance determinations. *Id.* at 649 (noting that the Texas judicial review cases "say nothing about employing the Warrant Clause" in this context). We do not believe the Circuit intended to decide the specific question before us today.

Moreover, neither *Traylor* nor *Freeman* addresses the Texas Constitution, under which we decide today's case. *See Freeman*, 242 F.3d at 654 (reaching its holding under the Fourth Amendment alone); *Traylor*, 492 F.2d at 1159 n.4 ("We intend no reflection on the continuing validity under state law of the Texas decisions cited by appellants . . . ."). Indeed, the *Freeman* dissent notes that "judicial oversight of public nuisance abatement . . . is required by Texas jurisprudence." 242 F.3d at 665 (Dennis, J., dissenting) (citing *Lurie*, 224 S.W.2d at 874).

We consider today not only our Takings and Due Process Clauses, which are generally regarded as functionally similar to their federal counterparts, but also our Separation of Powers Clause, which has no explicit federal analogue. *See* TEX. CONST. art. II, § 1 ("The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy . . . ."). As in most states, separation of powers principles are ingrained in the Texas Constitution, while they are merely implied in the United States Constitution. *See* Harold H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV. 1337, 1340 (1990); *see also* Neil C. McCabe, *Four Faces of State Constitutional Separation of Powers: Challenges to Speedy Trial and Speedy Disposition Provisions*, 62 TEMP. L. REV. 177, 185 (1989) ("The principle of separation of powers has evolved along parallel but distinctly different paths on the state and federal levels." (internal quotations omitted)). The scope of separation of powers is a function of governmental structure, and because of the differences between Texas and federal government, its requirements at the state level are different. This is especially true given its explicit treatment in our constitution. *See* Bruff, 68 TEX. L. REV. at 1348 (noting that the "prominence of Texas's constitutional command has given the separation-of-powers doctrine a

special vigor in a number of respects"). In particular, the fragmentation of Texas's executive branch "attenuates" the accountability of our administrative agencies. *Id.* at 1346 ("The structure of Texas government permits the ties between a particular agency and each of the three branches of the state government to be weaker—sometimes far weaker—than they would be in the federal government."). Accountability is especially weak with regard to municipal-level agencies such as the URSB, which are created by cities that "typically lack the separation of powers of the state and federal governments."[16] *Id.* at 1355. For these reasons, the Fifth Circuit cases cited by the City have little relevance to our decision today, which must rely on the Texas Constitution and our precedent.[17]

C. Agencies and Constitutional Construction

JUSTICE GUZMAN laments that we "miss[] the crux of the constitutional issue" before us. *See* ___ S.W.3d at ___. We agree that the "correct inquiry" is whether Stewart was afforded due process, *id.* at ___, but we cannot accept that the centrality of personal property rights, explicitly protected by two provisions of our constitution, has no bearing on the procedural requirements placed on an administrative agency when it adjudicates a question of direct constitutional import. Our opinion emphasizes the importance of an individual property owner's rights when aligned against an agency appointed by a City to represent the City's interests.[18] The character of the

[16] Individuals often have fewer statutory procedural protections before municipal agencies than they do before State agencies. *Compare* TEX. GOV'T CODE ch. 2001 (enumerating the procedural protections required for contested case hearings conducted by State agencies), *with* TEX. LOC. GOV'T CODE ch. 54, subch. C (permitting the creation of municipal building and standards commissions and defining the scope of their powers).

[17] It is also worth noting that *Traylor*, on which *Freeman* relies, predates both our decision in *Steele* as well as the reinvigoration by the Supreme Court of the constitutional fact cases, discussed below.

[18] Abatement actions are often motivated, at least in part, by a city's bottom line. *See* Nicole Stella Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 12-13 (2004) ("Blighted properties contribute to a city's economic problems by discouraging neighborhood investment, depriving the city of tax revenue, lowering the market value of

substantive rights protected, especially substantive constitutional rights, *must* be considered by a court determining what procedure is due. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (noting that, in determining what process is due, courts must pay close attention to the nature of "the private interest that will be affected by the official action"); *see also Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (noting, with regard to the important relationship between procedural due process and substantive rights, that "the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures").

In a takings case, a nuisance finding generally precludes compensation for the government's destruction of property. That is so because due compensation is typically a matter "determined by whether the conduct of the sovereign is classified as a noncompensable exercise of the police power or a deprivation of property through eminent domain." Cabaniss, 44 TEX. L. REV. at 1584 n.1. The nuisance determination, therefore, cannot be characterized as somehow apart from the takings claim, because the only sense in which such a determination is significant—its only meaning—is that it gives the government the authority to take and destroy a person's property *without compensation*. Nuisance findings are "determination[s]—in constitutional terms—that the structure has no value at all." D.R. Mandelker, *Housing Codes, Building Demolition, and Just Compensation: A Rationale*

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neighborhood property, and increasing the cost of business and homeowner insurance." (footnotes omitted)); *see also Freeman v. City of Dallas*, 242 F.3d 642, 667 (5th Cir. 2001) (en banc) (Dennis, J., dissenting) ("The City of Dallas has pecuniary interests in the outcome of [abatement] proceedings, e.g., justification for federal and state urban renewal grants; enhancement of the municipal tax base by promoting the replacement of old buildings with new ones."); *id.* at 664 ("The URSB is an agency of the City of Dallas charged with the remediation—including the demolition—of structures deemed by it to constitute urban nuisances. The URSB's job is to eliminate unsightly conditions adversely affecting the economic value of neighboring property and the City's tax base.").

for the Exercise of Public Powers Over Slum Housing, 67 MICH. L. REV. 635, 639 (1969). Specifically, the issue before us is whether, *in Stewart's takings claim*, the URSB's nuisance determination is res judicata. That is, should it have been a dispositive affirmative defense to her claim?[19] The nuisance finding is thus a value determination, like the value determination made by the board of commissioners in an eminent domain case. The board of commissioner's value determination, of course, is subject to de novo review in a trial court;[20] so, too, is the URSB's value determination in this case.[21]

Moreover, though the value determination that the board of commissioners makes in an eminent domain suit is wholly factual, based on market conditions and similar factors, it is given no weight on appeal to the trial court. The value determination the URSB made here, however, was

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[19] For this reason, JUSTICE GUZMAN's suggestion that, as an initial matter, this case falls outside the Takings Clause is peculiar. This case is outside the Takings Clause only if the property was *in fact* a nuisance and properly found as such. If the jury's failure to find that Stewart's property was a nuisance controls, then there was a taking. This case must therefore be analyzed with Takings Clause in mind.

[20] TEX. PROP. CODE § 21.018(b) (requiring that appeals from the board of commissioners' findings be tried "in the same manner as other civil causes").

[21] JUSTICE GUZMAN fails to articulate any logical reason for treating review of these two types of administrative valuation differently. We agree with JUSTICE GUZMAN that proper abatement has always required that the property be a nuisance in fact. But if this standard applies to all governmental action with respect to nuisances, why does the scope of review turn on whether the Legislature told the agency about the standard? The nuisance in fact requirement is a common law norm limiting all governmental exercise of the police power. Statute or no, the question is the same. So must be the standard of review.

The differing treatment of decisions of the URSB and condemnation commissioners is particularly notable considering that the board of commissioners in an eminent domain case is appointed by the trial court, TEX. PROP. CODE § 21.014(a) (requiring that the commissioners be appointed by the "judge of a court in which a condemnation petition is filed or to which an eminent domain case is assigned"), and therefore could be considered its agent. *Cf. N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 77 (1982) (approving of the use of magistrate judges as adjuncts to Article III courts). The agency here, though, is appointed by the City that is taking the property. DALLAS, TEX., CODE § 27-6, *repealed by* Dallas, Tex., Ordinance 26455 (Sept. 27, 2006).

largely a determination of law based on the application of statutory standards to historical facts. Such a determination is less, not more, appropriate for deferential agency review.

This is especially true because of the constitutional nature of the nuisance inquiry. In *Steele*, we observed that the law had "moved beyond the earlier notion that the government's duty to pay for taking property rights is excused by labeling the taking as an exercise of the police powers," *Steele*, 603 S.W.2d at 789, because the line between police power and takings is "illusory" and requires "a careful analysis of the facts . . . in each case of this kind." *Turtle Rock*, 680 S.W.2d at 804; *see also Parking Ass'n v. City of Atlanta*, 515 U.S. 1116, 1118 (1995) (Thomas, J., dissenting) (referring to the "fact-specific nature of takings claims"). Because a nuisance determination is an exercise of the police power, it, *like any other determination regarding the police power*, "is a question of law and not fact" that must be answered based upon a "fact-sensitive test of reasonableness." *Turtle Rock*, 680 S.W.2d at 804; *see also Sheffield*, 140 S.W.3d at 671 (observing that "'[c]ases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law'" (quoting *Eastern Enters. v. Apfel*, 524 U.S. 498, 541 (1998) (alteration in original)). We have even refused to give substantial deference to our lower courts when they make similar determinations. In *Mayhew v. Town of Sunnyvale*, we noted that while "determining whether a property regulation is unconstitutional requires the consideration of a number of factual issues," we do not grant deference because, "[w]hile we depend on the district court to resolve disputed facts regarding the extent of governmental intrusion on the property, the ultimate determination of whether the facts are sufficient to constitute a taking is a question of law." *Mayhew*, 964 S.W.2d 922, 932-33 (Tex. 1998) (citation omitted). Thus, in the takings context, we

may grant deference to findings of historical fact, but mixed questions of law and constitutionally relevant fact—like the nuisance determination here—must be reviewed de novo.

Cases from the United States Supreme Court provide further guidance. In a recent line of cases, that Court has reinvigorated the constitutional fact doctrine,[22] especially as it relates to appellate review of state and lower federal court decisions. *See, e.g.*, *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510-11 (1984) (holding, as "a rule of federal constitutional law," that appellate courts must give independent, de novo review to lower court determinations of actual malice in defamation cases, despite contrary statute). The reasoning of these cases applies with even greater force to agency decisions because while state and lower federal courts are presumed competent to handle constitutional matters, administrative agencies, for all the deference they are

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[22] The original "constitutional fact" cases dealt with review of administrative decisions implicating constitutional claims. *See* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 247-63 (1985). In an especially relevant case involving a confiscation challenge to a public utility rate order, the Supreme Court required plenary court review of constitutionally relevant facts. *See Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920). Central to the dispute in *Ben Avon* was the question of the value of the utility's property. *See id.* at 288. The Supreme Court held that the utility was entitled to independent judicial judgment on a question, such as this, which implicated the Takings Clause. *Id.* at 290-91. *Ben Avon* itself supports our holding today. Though it has not been recently cited for its original holding, it has also never been overruled. *See Sheffield*, 140 S.W.3d at 660 (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("[I]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [a lower court] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of its own decisions.") (citation omitted) (alterations in original)). We decide today's case under the Texas Constitution, and, thus, Supreme Court precedent does not control, but because of the similarities between the United States Constitution and that of our state, it is authority of the utmost persuasiveness. *See id.* (noting that even where a takings decision is made under the Texas Constitution, "we do look to federal takings cases for guidance in applying our own constitution").

The constitutional fact doctrine was affirmed in *Crowell v. Benson*, 285 U.S. 22, 56-58 (1932), where the Court held that constitutional facts must be found by a court. *See also* Monaghan, 85 COLUM. L. REV. at 253 (noting that in *Crowell*, the Court "confirmed and generalized the constitutional fact doctrine in strong terms"). After *Crowell*, though, the constitutional fact doctrine fell into relative desuetude. *See* Adam Hoffman, Note, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE L.J. 1427, 1449 (2001); *see also N. Pipeline*, 458 U.S. at 82 n.34 ("*Crowell*'s precise holding, with respect to 'jurisdictional' and 'constitutional' facts that arise within ordinary administrative proceedings, has been undermined by later cases."). *But see Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) (approvingly citing *Crowell* for the proposition that the Supreme Court "retains an independent constitutional duty to review factual findings where constitutional rights are at stake").

typically given, occupy a subordinate status in our system of government. *See* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 239 (1985) (noting that in the context of administrative agencies, "a strong argument can be made that enforcement tribunals *must* undertake constitutional fact review" for reasons "rooted in the 'legitimacy deficit' inherent in administrative adjudication."); *see also* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1842-47 (2005) (noting that administrative agencies can be thought to suffer from problems of legal, sociological, and moral illegitimacy).[23]

The Supreme Court has required constitutional fact review primarily in the context of the First and Fourth Amendments. In those areas, facts tend to be deeply intertwined with legal issues, necessitating independent review. In *Miller v. Fenton*, 474 U.S. 104, 114 (1985), the Supreme Court noted that where "the relevant legal principle can be given meaning only through its application to the particular circumstances of a case," it is "reluctant to give the trier of fact's conclusions presumptive force . . . ." The *Miller* Court considered whether it was required to defer to a trial court's determination that a confession was voluntary. *Id.* at 105-06. The Court rejected that approach, holding that voluntariness was a fact-specific, but nonetheless legal, determination. *Id.*

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[23] Indeed, according to Professor Monaghan,

> [i]n terms of the constitutional design, the whole process of substituting administrative for judicial adjudication may be thought to suffer from a serious "legitimacy deficit." The constitutional fact doctrine is an effort to overcome this problem, to reconcile the imperatives of the twentieth century administrative state with the constitutional preference for adjudication by the regular courts. It does so by requiring, at a minimum, that a court asked to enforce an administrative order must engage in constitutional fact review.

Monaghan, 85 COLUM. L. REV. at 262 (footnote omitted); *see also* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1844 (2005) (noting that the sociological legitimacy deficit of administrative agencies is "serious, even alarming").

at 116 ("[T]he admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne."). Similarly, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 567 (1995), the Court held that determinations of whether an activity constitutes free speech, protected by the First Amendment, carry with them "a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court." This independent review is required because "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace," and so a reviewing court "must thus decide for [itself] whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Id.* And in *Ornelas v. United States*, 517 U.S. 690, 695-97 (1996), the Supreme Court held that appellate courts must independently determine what constitutes "reasonable suspicion" and "probable cause." Again, the mixed nature of questions of law and findings of constitutional fact were controlling:

> Articulating precisely what "reasonable suspicion" and "probable cause" mean is not possible. . . . They are . . . . fluid concepts that take their substantive content from the particular context in which the standards are being assessed. The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause. *The first part of the analysis involves only a determination of historical facts, but the second is a mixed question of law and fact . . . .*

Id. at 695-96 (citations omitted) (emphasis added).

Takings claims also typically involve mixed questions of fact and law. *See Mayhew*, 964 S.W.2d at 932-33. An analysis of whether a structure is a nuisance requires fairly subtle consideration. There are initial questions of historical fact—whether or not the structure had foundation damage, for example. These questions are within the competence of the administrative agency and are accorded deference. But the second-order analysis, which applies those historical facts to the legal standards,[24] are questions of law that determine the constitutionality of a property's demolition. *See id.* These legal-factual determinations are outside the competence of administrative agencies.[25]

Indeed, we have held that an agency's adjudicative power is strongest where it decides purely statutory claims and weakest where it decides claims derived from the common law. *Compare Emps. Ret. Sys. of Tex. v. Duenez*, 288 S.W.3d 905, 910 (Tex. 2009) (refusing to construe a statute to permit an agency to decide subrogation claims because those claims "existed at common law long before [the agency] was created"), *with Subaru of Am., Inc. v. David McDavid Nissan, Inc.*,

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[24] E.g., did the damage to the structure make it a threat to public health or safety such that the government may deprive a citizen of her ownership of the structure?

[25] Our holding today is restricted to judicial review of agency decisions of substantive constitutional rights, and thus, despite JUSTICE GUZMAN's assertions to the contrary, ___ S.W.3d at ___, it does no violence to the general rule that trial court decisions on mixed questions of fact and law are reviewed for abuse of discretion. *See State v. $217,590 in U.S. Currency*, 18 S.W.3d 631, 633 (Tex. 2000). We note, however, that we have already recognized the existence of exceptions to that rule on the basis of the constitutional concerns. For example, Texas appellate courts follow *Bose*'s requirement that they independently review trial court findings of actual malice in defamation cases. *Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 623-24 (Tex. 2004); *Turner v. KTRK TV, Inc.*, 38 S.W.3d 103, 120 (Tex. 2000) ("Federal constitutional law dictates our standard of review on the actual malice issue, which is much higher than our typical 'no evidence' standard of review."). Likewise, we have repeatedly left open the question of whether the constitution requires de novo review in parental termination cases. *See In re J.F.C.*, 96 S.W.3d 256, 267-68 (Tex. 2002); *In re C.H.*, 89 S.W.3d 17, 29 (Tex. 2002) (Hecht, J., concurring). And in *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 932-33 (Tex. 1998), we refused to defer to the trial court's determination of factual issues in a regulatory takings case because "the ultimate determination of whether the facts are sufficient to constitute a taking is a question of law." *See also Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 307-08 & n.34 (Tex. 2006) (noting that the constitution requires de novo review of the constitutionality of punitive damage awards).

84 S.W.3d 212, 227 (Tex. 2002) (permitting an agency to decide claims arising "from a statute and not the common law"). The protections we have previously provided to common law claims should apply with special force to claims founded in our constitution, because the power of constitutional construction is inherent in, and exclusive to, the judiciary. *See Firemen's & Policemen's Civil Serv. Comm'n v. Kennedy*, 514 S.W.2d 237, 239 (Tex. 1974) (holding that courts may consider the constitutionality of agency action even where judicial review is not provided for by statute).

Many agencies make decisions that affect property interests—such as licensure and rate setting—but in so doing they do not actually engage in constitutional construction. *See* 1 BEAL, TEXAS ADMINISTRATIVE PROCEDURE & PRACTICE § 9.3.1[c]. Rather, constitutional challenges to agency decisions typically deal not with the substance of the agency's decision but, rather, with the procedures that the agency followed in making it. *See, e.g.*, *Blackbird*, 394 S.W.2d 159; *Brazosport*, 342 S.W.2d 747. The rules governing such procedural challenges are already well established. *Kennedy*, 514 S.W.2d at 239. Thus, all that is before the us today is agency authority to *actually decide* substantive constitutional claims.

III. Response to Motion for Rehearing

The City and a number of amici[26] urge us to grant rehearing. They argue that failing to accord administrative nuisance determinations preclusive effect will open the floodgates for takings claims. Because takings claims have a ten-year statute of limitations, they contend, parties will now

[26] The International Municipal Lawyers Association, the Texas City Attorneys Association, the Texas Municipal League, and the Cities of Abilene, Aledo, Cleburne, Euless, Fort Worth, Garland, Granbury, Haltom City, Houston, Irving, Kennedale, Lake Worth, McAllen, Mesquite, North Richland Hills, River Oaks, Saginaw, San Antonio, Southlake, and Sulphur Springs have submitted amicus curiae briefs in support of the City's motion for rehearing.

sue to challenge demolitions that occurred any time in the past ten years. Finally, the amici assert that our decision effectively eliminates administrative nuisance abatement because cities lack the resources to file suit to abate every nuisance.

These arguments overlook three key facts. First, takings claims must be asserted on appeal from the administrative nuisance determination. Although agencies have no power to preempt a court's constitutional construction,[27] a party asserting a taking must first exhaust its administrative remedies and comply with jurisdictional prerequisites for suit. We recently explained that a litigant must avail itself of statutory remedies that may moot its takings claim, rather than directly institute a separate proceeding asserting such a claim. *See City of Dall. v. VSC*, 347 S.W.3d 231, 234-37 (Tex. 2011). We held that "if a remedial procedure might have obviated the need for a takings suit, then the property simply had not, prior to the procedure's use, been taken *without just compensation*." *Id*. at 237. We apply the same rationale here. Had Stewart convinced the URSB that her property was not a nuisance, the City would not have obtained a demolition order, and Stewart's takings claim would fail. Because she was unsuccessful before the Board, she properly asserted her takings claim on appeal to district court.

Thus, as one commentator has noted, "even though [a constitutional] claim may be asserted for the first time in the district court upon appeal of the agency order, a failure to comply with the appeal deadlines and/or the failure to so assert the constitutional claim at that time, precludes a party from raising the issue in a separate proceeding." 1 BEAL, TEXAS ADMINISTRATIVE PRACTICE AND PROCEDURE § 9.3.1[c]; *see also Tex. Comm'n on Envtl. Quality v. Kelsoe*, 286 S.W.3d 91, 97 (Tex.

[27] *Cent. Power & Light Co. v. Sharp*, 960 S.W.2d 617, 618 (Tex. 1997).

App.—Austin 2009, pet. denied) (holding that a party making a constitutional claim must nonetheless comply with statutory prerequisites for judicial review). A party cannot attack collaterally what she chooses not to challenge directly. Cities are not, therefore, subject to new takings suits for long-concluded nuisance abatements.

Second, property owners rarely invoke the right to appeal.[28] This may be due to the correctness of the nuisance finding, to the time and expense involved,[29] or to the Local Government Code's narrow thirty day window for seeking review. *See* TEX. LOC. GOV'T CODE § 214.0012(a) (requiring appeals to be filed within thirty days of order). Or it may be because an unsuccessful appellant must pay the municipality's attorney's fees and costs. *Id*. § 214.0012 (h) (requiring appellant to pay municipality's attorney's fees, costs, and expenses, if municipality's decision is affirmed or "not substantially reversed").

Third, and perhaps most importantly, 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. Given these considerations, we disagree with the City's and the amici's characterization of the effects of our holding.

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[28] The amici have provided some anecdotal evidence on this point. The City of Fort Worth states that over the past ten years it has brought 1,250 cases to its Building Standards Commission, and fewer than ten of those were appealed to district court. The City of Sulphur Springs has abated 86 structures by demolition over the past five years; in 68 of those abatements, the property owner acquiesced in the demolition order. The City of Mesquite has taken 18 cases to its Building Standards Board since 2009. Of those 18, 15 were ordered demolished, and 14 have been demolished. The one remaining property is apparently the only one in which the owner appealed the case to district court, and that appeal has been dismissed for want of prosecution.

[29] This includes not just litigation costs, but also the civil penalties municipalities can assess against property owners who fail to comply with repair or demolition orders. *See, e.g., Freeman*, 242 F.3d at 645 (noting that the URSB could impose penalties of up to $2000 per day) (citing DALLAS, TEX., CODE ch. 27, art. II, § 27-8).

IV. Conclusion

That the URSB's nuisance determination cannot be accorded preclusive effect in a takings suit is compelled by the constitution and *Steele*, by *Lurie* and its antecedents, by the nature of the question and the nature of the right. The protection of property rights, central to the functioning of our society,[30] should not—indeed, cannot—be charged to the same people who seek to take those rights away.

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.

We affirm the court of appeals judgment. TEX. R. APP. P. 60.2(a).

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Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: January 27, 2012

[30] *See, e.g.*, JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 133 (2004) ("The reason why men enter into society is the preservation of their property . . . .").