CASE NO. 01-12-00053-CV

HDW2000 256 East 49th Street, LLC, et al
Appellant

VS.

THE CITY OF HOUSTON
Appellee

§ IN THE COURT OF APPEALS

§ FOR THE FIRST DISTRICT

§ OF TEXAS

APPELLANTS' MOTION FOR EN BANC HEARING

COME NOW, HDW2000 EAST 49TH STREET, LLC AND WESTBURY, INC., Appellants, and files this Appellants'Motion for En Banc Hearing:

I

This motion is being filed in conformance with TRAP 49.1 and 49.7.

II.

This motion is opposed by Appellee.

III.

The Court of Appeals issued its opinion on December 6, 2012. On December 20, 2012 Appellants requested a fourteen (14) day extension to file its Motion for Rehearing to January 4, 2013. This motion was timely filed in accordance with TRAP 49.8 and the Court retains plenary jurisdiction.

IV.

A. Motion for en banc hearing

a. Introduction

Appellants are HDW2000 256 East 49th Street LLC and Westbury, Inc. Appellee is the City of Houston. A panel of the Court issued the judgment and opinion in this case on December 6, 2012. A copy of the Memorandum Opinion is attached as Exhibit A. The panel that rendered judgment in this case consisted of Justices Jennings, Higley and Sharp.

b. Argument & Authorities

The Court has the authority to grant this motion and submit the case to the full court, sitting en banc. Tex. R. App. P. 41.2. The primary issue was whether the substantial evidence supported the summary judgment upholding the Order of the City of Houston Building and Standards Commission. The panel resolved the issue by holding that there was more than a scintilla of evidence to support the Order.

The evidence in this case clearly demonstrates that the findings of the Building and Standards Commission were overbroad, not supported by the evidence and invalid as a matter of law. The panel wrongfully upheld orders which included alleged code and ordinance violations where the undisputed evidence clearly showed that no such violations existed at the time of the hearing.

Additionally, the panel's resolution of this case, by finding that one or more violations supports an Order that includes violations which were not proven, is contrary to an opinion issued by the Fourteenth Court of Appeals, No. 14-11-00051-CV, Secure Properties, Inc. v. City of Houston, Jan. 12, 2012. Exhibit B. In that case, the Court reversed and remanded Code violations which were included in the Order but were not supported by the evidence.

The issue in this case presents such an extraordinary circumstance that resolution of the issue by the Court en banc is necessary. TRAP 41.2(c). Where an order of the Building and Standards Commission finds numerous violations which the City admits are not supported by the evidence, the entire order is defective. The panel incorrectly takes the position that if there is a scintilla of evidence on one of the code violations in the order, the entire order should be upheld, even though there was absolutely no evidence of violations of the other code provisions included in the order.

Filed along with this motion is the brief, offered on rehearing, which argues the merits of this motion.

PRAYER

Based on the foregoing arguments and authorities, the Court should hear this case en banc, and the Order of the 113TH Judicial District Court of Harris County, Texas, must be reversed and the case remanded to the trial court for further proceedings.

Dated: January 4, 2013.

Filed this the 4th day of January, 2013.

Respectfully submitted,

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ATTORNEY FOR APPELLANTS

CERTIFICATE OF SERVICE

I certify that on this the 4th day of January, 2013, a true and correct copy of this HDW2000 256 East 49th Street LLP and Westbury, Inc.'s Appellants' Motion for En Banc Hearing, was served on each person listed below by the method(s) indicated:

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Counsel for Appellee

___ Certified Mail RRR
_____ Facsimile Transmission
_____ Regular Mail
__XX__ Personal Delivery

ROBERT G. LOWMAN, JR.

Opinion issued December 6, 2012

In The

Court of Appeals

For The

First District of Texas

NO. 01-12-00053-CV

HDW2000 256 EAST 49th STREET and
WESTBURY, INC., Appellants

V.

THE CITY OF HOUSTON, Appellee

On Appeal from the 113th District Court
Harris County, Texas
Trial Court Cause No. 2008-46371

MEMORANDUM OPINION

Appellants, HDW2000 256 East 49th Street, L.L.C. and Westbury, Inc. (collectively "Westbury") challenge the trial court's summary judgment in favor of appellee, the City of Houston ("the City") on Westbury's federal and state due

EXHIBIT A

process claims and the trial court's substantial evidence review affirming orders of the City's Building and Standards Commission ("the Commission"). In two issues, Westbury contends that the trial court erred in finding that there is substantial evidence to support the orders of the Commission pertaining to their property and the trial court erred in granting summary judgment on their due process claims.

We affirm.

Background

The Texas Legislature authorizes municipalities to regulate housing and other structures and issue orders requiring the repair, removal, and demolition of such structures, after notice and hearing. *See* TEX. LOC. GOV'T CODE ANN. §§ 214.001, .003 (West 2008 & Supp. 2012), §§ 214.0011–.002, .004–.005 (West 2008), § 214.0031 (West Supp. 2012). Section 214.0012 provides for judicial review of such orders. The Local Government Code authorizes the appointment of a local Building and Standards Commission to hear and determine cases alleging violations of health and safety ordinances. *See* TEX. LOC. GOV'T CODE ANN. §§ 54.031–.034, .036–.039, .041–.044 (West 2008), §§ 54.035, .040. The Commission conducts administrative hearings pursuant to this authority, and judicial review of its decisions is statutorily prescribed. *See id.* § 54.039(a); *see generally* Houston, Tex., Code of Ordinances ch. 10, art. IX, §§ 10–341–360 (2011) (formerly §§ 10–391–410). Because Westbury seeks judicial review of the

Commission's decision, section 54.039 will control.

Westbury owns several buildings, including a theater, commonly known as "Westbury Square." The three buildings at issue in this case were designated by the City as Buildings 1, 5, and 11, its theater. In 2008, the City initiated proceedings concerning the condition of the three buildings and on May 29, 2008 sent hearing notices to Westbury. The notices specified under which code sections of Chapter 10 of Houston's Code of Ordinances the three buildings were alleged to be substandard, dangerous, and otherwise in violation. The Commission conducted a hearing on June 18, 2008, and it issued separate orders on June 23, 2008 pertaining to each of the three buildings.

The Commission found that each of the three buildings was dangerous, substandard, and in violation of numerous sections of Chapter 10 of the City's Code of Ordinances. The Commission's orders required Westbury to obtain permits to repair the deficiencies that had made the structures dangerous within 30 days. The Orders also authorized the City to "remedy, alleviate, or remove any substandard or dangerous building" and place liens on the properties if the City took such measures.

On July 18, 2008, Westbury filed an Original Petition for Judicial Review, and the district court's review was limited to a hearing under the substantial evidence rule. TEX. LOC. GOV'T CODE ANN. § 54.039 (f) (West 2008).

Westbury later amended their petition to assert that the City had violated their state and federal procedural and substantive due process rights. On January 7, 2010, the City removed the case to the United States District Court for the Southern District of Texas. *See* 28 U.S.C. §§ 1331, 1343, and 1441. There, the City sought and was granted summary judgment on Westbury's state and federal substantive and procedural due process claims. The federal court expressly ruled on both the Texas and federal due process claims. The federal court then declined to exercise supplemental jurisdiction over the substantial evidence review of the Commission's decision, and it remanded those claims to the state court.

Back in state court, the City filed a motion for summary judgment on Westbury's federal and state substantive and procedural due process claims based on res judicata, specifically, issue preclusion. The trial court granted the City's summary-judgment motion on December 29, 2011, entering an order that dismissed Westbury's due process claims on the basis of res judicata.

The trial court conducted the substantial evidence review of the Commission's decision and issued its final judgment on December 14, 2011. In its judgment, the trial court ordered that Westbury take nothing, and it affirmed the Commission's orders.

Substantial Evidence Review

In their first issue, Westbury argues that the trial court erred in affirming the

orders of the Commission because the orders are not supported by substantial evidence.

Substantial evidence review is limited in that it requires "only more than a mere scintilla," to support an agency's determination. *City of Dallas v. Stewart*, 361 S.W.3d 562, 566 (Tex. 2012) (quoting *Montgomery Indep. Sch. Dist. v. Dallas*, 34 S.W.3d 559, 566 (Tex. 2000)). Substantial evidence review "gives significant deference to the agency" and "does not allow a court to substitute its judgment for that of an agency." *R.R. Comm'n of Texas v. Torch Operating Co.*, 912 S.W.2d 790, 792 (Tex. 1995). Under the substantial evidence standard of review, "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). An agency's findings, inferences, conclusions, and decisions are presumed to be supported by substantial evidence, and the party appealing the agency decision has the burden of proving otherwise. *City of El Paso v. Pub. Util. Comm'n of Tex.*, 883 S.W.2d 179, 185 (Tex.1994).

The record of the proceedings before the Commission that was considered by the trial court included the Commission's notices to Westbury, tapes and DVD recordings of the June 18, 2008 hearing, transcripts of the hearing, photographs of

the property, and an eight-minute video of a walk-through of the property.[1] The same evidence is contained in the appellate record, including the eight-minute video.[2] A review of the record demonstrates that there is substantial evidence to support the Commission's determination that the three buildings at Westbury Square were in violation of the City's Code of Ordinances.

As determined below, the Commission heard testimony about the three buildings from City inspector Steve Gomez of the Houston Police Department ("HPD") Neighborhood Protection Corps. Gomez testified that he began inspections of the three buildings at Westbury Square in 2005 and he had last inspected the property on June 17, 2008, only one day before the Commission's

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1 In the trial court, counsel for Westbury admitted that the record presented to the trial court for its substantial evidence review was the same record presented to the Commission, and he made no objection on that basis. On appeal, Westbury argues that the record of the Commission hearing is inadequate for judicial review purposes. Having failed to object to the record as it was submitted to the trial court, Westbury has waived any issue regarding the record. *See Pavelka v. Texas Workforce Comm'n*, No. 03-05-00293-CV, 2006 WL 2852507 *4 (Tex. App.–Austin Oct. 3, 2006) (finding waiver when party did not object in the administrative record offered into evidence at judicial review trial); *see also* TEX. R. APP. P. 33.1. Even if Westbury had not waived this complaint by failing to object to the trial court, this issue is part of Westbury's due process claims that were adjudicated in the federal court.

2 Westbury asserts in their reply brief that this eight-minute video was not included in the clerk's or reporter's record and is not part of the appellate record, thus making the City's reference and reliance on the video improper. However, the video is in fact part of the appellate record, contained in Volume 5 of the reporter's record. Therefore, the eight-minute video of the property is properly before this Court for review.

hearing. Other evidence offered by the City included photographs and the eight-minute video walk-through of the properties filmed the day before the hearing.

Building No. 1

The Commission found that Building 1 was in violation of provisions 10-341, 10-343, 10-344, 10-361, and 10-451 of the City's Code of Ordinances. In its order, the Commission stated that Building 1 was a dangerous building within the terms of sections 10-361(a) (2, 3, 4, 5, 8, 11), (b) (1, 2, 3) and (c), and it stated that Building 1 was substandard within the terms of section 10-341(e).

These code provisions require that buildings within the City be free of dead trees, trash, refuse, glass, or building materials (section 10-341(e)); be secure from unlawful entry by vagrants, uninvited persons or children (section 10-361(a)(11)); not have 33% or more damage or deterioration to supporting members or 50% or more damage to non-supporting members or outside walls or coverings (section 10-361(a)(2)); have weather tight and waterproof roofs and walls (section 10-361(a)(3)); may not have loads improperly distributed on floors or roofs, may not have overloaded floors, and have floors and roofs of sufficient strength for the purpose used (section 10-361(a)(4)); parts of the property must be properly attached so as not to fall and injure people (section 10-361(a)(5)); not be damaged generally by various causes such as vandalism or elements of nature such that they are dangerous to the life, safety, or general health and welfare of the occupant or

inhabitants of the city (section 10-361(a)(8)); not be a danger to the public even though secured from entry (section 10-361(b)(1)); not have roofs, walls and floors that have holes allowing insects, rodents or pests to gain access for harborage to the extent that it presents a hazard to health or safety (section 10-361(b)(2)); if boarded-up, must be adequate to secure to prevent unauthorized entry or use of the building (section 10-361(b)(3)); if under a person's control, not be in a condition as to constitute a dangerous building (section 10-361(c)); be free of weeds, brush, rubbish and all other unsightly or unsanitary matter of whatever nature, holes that hold or are liable to hold stagnant water, "any other cause . . . liable to cause disease or produce, harbor, or spread disease germs of any nature or tend to render the surrounding atmosphere unhealthy, unwholesome, or obnoxious" (section 10-451(b)(10)).

This Court has reviewed the video walk-through. Almost the first three minutes of the video shows the condition of Building 1. During the hearing, inspector Gomez noted and explained the deficiencies in Building 1 as shown in the videotape. He pointed out that the videotape shows that a wall had been removed from the building and covered with plastic, a front portion of the building had been boarded up, but the soffits were still open, and a section of a wall that had once been open, had on it plywood that was falling down and holes and cracks. The video also shows roof damage, veneer damage and open soffits. Gomez

evidence of vagrant activity in his initial inspection. He also noted that there were seals and supporting members with deterioration on the exterior wall causing improperly distributed loads at the ground level of the building in violation of section 10-361(a)(4).

Westbury asserts that there is not substantial evidence to support the Commission's finding that Building 1 was not secured from unauthorized entry in violation of section 10-361(b)(3). Inspector Gomez did testify that Building 1 was determined to be unsecured after his inspection in 2005 and it was later secured. However, at the time of the June 2008 hearing, some of the plywood that had been used to secure the building had started pulling away from the structure, thus making it once again unsecured from unauthorized entry.

We conclude that the record from the hearing contains more than a scintilla of evidence to support the Commission's findings that Building 1 was in violation of the listed city ordinances related to dangerous and substandard buildings. Accordingly, we hold that the trial court did not err in finding that the Commission's order relating to Building 1 is supported by substantial evidence.

Building No. 5

The Commission found that Building 5 was in violation of provisions 10-341, 10-343, 10-344, 10-361, and 10-451 of the City's Code of Ordinances. In its order, the Commission stated that Building 5 was a dangerous building within the

terms of sections 10-361(a) (2, 3, 4, 5, 8, 11), (b) (1, 2, 3) and (c), and it noted that Building 5 was substandard within the terms of section 10-341(e).

Inspector Gomez testified that he found the following code deficiencies at Building 5: 10-341(e), 361((a)(11), (a)(2), (a)(3), (a)(4), (a)(5), (a)(6), (a)(8), 361(b)(1), (b)(2), (b)(3), 361(c), and 10-451(b)(10). In detailing the deficiencies of Building 5, Gomez noted:

> Building No. 5 is a two-story – a two-story, wood-frame multifamily structure on concrete slab. The exterior of the structure needs protective coating, has deterioration of the exterior veneer. Due to the elements of nature, the roof is in great disrepair. The means to cover this is with – they seem to have put plastic over the roof in the meantime.
> Also, the – okay. Cover – loose surface materials, holes, cracks. The property has high weeds, rubbish in the back portion of the property, open storage of building materials causing rat harborage conditions. And this is in the back section of the property.

Inspector Gomez also noted and explained the deficiencies in Building 5 as shown in the videotape including roof damage. Although Gomez noted that the structure had been previously secured where a lot of windows had been broken, he noted deterioration to the exterior walls and that "pieces of things of the exterior were hanging down." Also, mold and deterioration existed on the lower portion of the exterior walls of the building. At the back portion of the building, some siding was falling off. Watching the video in the hearing Gomez explained:

> This is one side of the building, can see this is a stairwell – wooden stairwell going to the upstairs. This is a back portion of this building, can see some deterioration, some of the siding falling. There is where he – attempts were made to secure the structure itself. There's plastic covering up the roof and section there of wall.
>
> This is some of the rubbish and high weeds and open storage building material in the back. It's more plastic that's up there trying to cover the damage to the roof. High weeds, brush causing rat harborage conditions. More high weeds, Open storage building materials, brush, trash, rubbish.
>
> It's more holes, cracks in the exterior walls of the building. More holes, cracks. Trash and rubbish you see here. See more deterioration of the soffits. See the extensive roof damage on top.

We conclude that the record from the hearing contains more than a scintilla of evidence to support the Commission's finding that Building 5 was in violation of the listed city ordinances related to dangerous and substandard buildings. Accordingly, we hold that the trial court did not err in finding that the Commission's order relating to Building 5 was supported by substantial evidence.

Building No. 11

The Commission found that Building 11 was in violation of provisions 10-343, 10-344, 10-361, and 10-451 of the City's Code of Ordinances. In its order, the Commission stated that Building 11 was a dangerous building within the terms of sections 10-361(a) (2, 3, 5), (b) (1, 2, 3) and (c), and it noted that Building 11

was substandard within the terms of section 10-343(3)(11).

Inspector Gomez, concerning Building 11, the theater, testified as follows:

> CITY'S ATTORNEY: Are you familiar with 536 Westbury Square Building No. 11 known as a theater?
>
> MR. GOMEZ: Yes, I am.
>
> CITY'S ATTORNEY: Initially, were there deficiencies of Chapter 10 with that structure?
>
> MR. GOMEZ: Yes, there was.
>
> CITY'S ATTORNEY: You listed codes of 10-343(c)(11), 361(a)(2), (a)(3), (a)(5), 361(b)(1), (b)(2), (b)(3), and (c). Additionally, 10-451(b)(10). What were the deficiencies of that structure?
>
> MR. GOMEZ: At that initial inspection, the exterior wall was taken down and it was boarded up again and the means to secure it started deteriorating again. But upon my last inspection yesterday, he actually repaired the whole rear wall adequately enough. And to my recommendation, that that building had been in compliance, everything was corrected on that building.
>
> CITY'S ATTORNEY: So do you submit for the record that Building No. 11 is in com – Building No. 11, the theater, is in compliance and that none of the deficiencies of Chapter 10 in which you listed exist at this time?
>
> MR. GOMEZ: The only thing that I saw was there's still – on the high section of the wall, there was a couple of bricks that were missing. But other than that, the rest of the wall was completed.
>
> CITY'S ATTORNEY: I'll ask again, is Building No. 11 totally in compliance?

MR. GOMEZ: Well –

CITY'S ATTORNEY: According to the deficiencies of Chapter 10 in which you listed?

MR. GOMEZ: No.

CITY'S ATTORNEY: Can you please tell –

MR. GOMEZ: It would still be probably Section 10-361(a)(3), roofs and walls that are not weather tight and waterproof that would still be in violation.

Gomez noted in his narration of the video walk-through that the theater had been painted and Hardiplank had been installed on the exterior wall, but there was still a hole on the corner of the outside brick veneer. Additionally, the video showed high weeds near Building 11, as well as some building materials left on the ground.

There is evidence in the record that Westbury did not have a permit to make the repairs it had made to Building 11. Inspector Gomez testified that he was not aware of a permit for Building 11 and had not seen one on the building. Other evidence showed permits for Buildings 1 and 5, but not for Building 11.

We conclude that the record from the hearing contains more than a scintilla of evidence to support the Commission's finding that Building 11 was not weather tight and waterproof. *See* Houston, Tex., Code of Ordinances ch. 10, art. IX, § 10-361 (2002). Additionally, the record from the hearing shows that the Commission heard evidence that Westbury had not obtained the appropriate permits to make the repairs that had been done to the building. And it could not show that the

completed repairs had been made in compliance with the City's Code provisions. We conclude that the record from the hearing contains more than a scintilla of evidence that Building 11 was not in compliance with the listed city ordinances related to dangerous and substandard buildings. Accordingly, we hold that the trial court did not err in finding that the Commission's order relating to Building 11 is supported by substantial evidence.

We overrule Westbury's first issue.

Due Process Claims

In their second issue,[3] Westbury argues that the trial court erred in granting the City summary judgment on their claims that the Commission violated their due process rights under Texas Constitution, article 1, section 19 and the Fourteenth Amendment of the United States Constitution because (1) the Commission did not provide Westbury adequate notice; (2) Westbury was prevented from showing contradictory evidence during cross-examination and was not allowed proper cross-examination; (3) the Commission entered a demolition order without findings to support it; (4) the City's presentation of the evidence portrayed Westbury's buildings in a false light and provided a misleading perception of the general condition of the buildings; (5) the record from the Commission's proceedings was incomplete and inadequate for judicial review; and (6) Westbury

[3] Our review of this issue on appeal is limited to the trial court's grant of the City's motion for summary judgment on the grounds of res judicata.

requested, but was not given the opportunity to review in advance the evidence that the City intended to present at the hearing, thus denying them an opportunity to properly prepare a defense for the Commission's hearing. In regard to its procedural and substantive due process claims, Westbury does not make any distinction in regard to its rights under article 1, section 19 of the Texas Constitution and the Fourteenth Amendment. Westbury does not argue that the Texas Constitution provides it with any greater protections than does the United States Constitution. It merely cites the Texas Constitution along with the Fourteenth Amendment.

Westbury's same due process claims framed the basis for the City's removal to federal district court. Once in federal court, the City moved for summary judgment on Westbury's due process claims, and the federal court granted the City's summary judgment, expressly ruling on both the Texas and federal due process claims. After the case was remanded back to state court, the City filed another motion for summary judgment on the basis of res judicata and issue preclusion asserting that Westbury's due process arguments had been fully and finally decided by the federal district court and could not be re-litigated in state court.

Standard of Review

To prevail on any summary-judgment motion, including one based on res

the relitigation of a claim or cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, should have been litigated in the prior suit." *Id.* Collateral estoppel or issue preclusion prevents relitigation of particular issues already resolved in a prior suit involving the same parties and the same issues of fact or law. *Id.*; *see also Acker v. City of Huntsville*, 787 S.W.2d 79, 80 (Tex. App.–Houston [14th Dist.] 1990, no writ). "The policies behind [res judicata] reflect the need to bring all litigation to an end, prevent vexatious litigation, maintain stability of court decisions, promote judicial economy, and prevent double recovery." *Barr*, 837 S.W.2d at 629.

Issue Preclusion

The City argued res judicata on the basis of issue preclusion as the ground for summary judgment on Westbury's state and federal due process claims. Issue preclusion or collateral estoppel applies to block Westbury's relitigation of their due process claims making the trial court's grant of summary judgment appropriate. Issue preclusion bars the re-ligation of identical issues of fact or law that were actually litigated and essential to the judgment in a prior suit. *Van Dyke v. Boswell, O'Toole, Davis & Pickering*, 697 S.W.2d 381, 384 (Tex. 1985); RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

There are three elements necessary to establish issue preclusion: "(1) the facts sought to be litigated in the second action were fully and fairly litigated in the

prior action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action." *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984). Those elements are present here.

First, both parties were permitted by the federal court to fully and fairly litigate Westbury's federal and state due process claims. The record reflects that in response to the City's motion for partial summary judgment on the due process claims, Westbury filed a lengthy response of almost 100 pages with exhibits. Westbury's operative pleading in federal court was the same as their pleading in state court. Westbury's due process claims were raised by the pleadings and briefed by the parties. And the federal court was competent to render a determination on Westbury's due process issues.

Next, "the appropriate question is whether the issue was recognized by the parties as important and by the trier of fact in the first action as necessary to the first judgment." *See Acker*, 787 S.W.2d at 81. Again, the factual assertions underlying Westbury's due process claims revolved around adequate notice and the hearing conducted by the Commission. We note that in neither the trial court below, nor in this Court, did Westbury make any distinction in regard to its rights to due process under the Texas Constitution and the United States Constitution. The record before us establishes that the factual assertions underlying Westbury's

procedural and substantive due process claims are the same and were essential to the first judgment.

There can be no doubt that the third element required for the application of issue preclusion, that the parties be cast as adversaries in the first action, exists here. Because this is the same litigation with the same parties upon removal to the federal court and on remand back to the state court, on that point there can be no dispute.

The broader and more general principal of res judicata also applies to block Westbury's relitigation of their state and federal due process claims. The preclusive effect of a federal judgment is determined by federal law. *Eagle Props., Ltd. v. Scharbauer*, 807 S.W.2d 714, 718 (Tex. 1990) ("[S]ince the first suit was decided in federal court . . . federal law controls the determination of whether res judicata will bar a later state court proceeding."). Under federal law, for the doctrine of res judicata to apply, four elements must be satisfied: (1) the parties must be identical or in privity; (2) the prior judgment must have been rendered by a court of competent jurisdiction; (3) there must have been a final judgment on the merits; and (4) the same cause of action must be involved in both cases. *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 571 (5th Cir. 2005); *see also Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652, (Tex. 1996); *Coal. of Cities for Affordable Util. Rates v. Pub. Util. Comm'n of Tex.*, 798 S.W.2d 560, 562-563

(Tex. 1990). The actions involve the same claims if they are based on "the same nucleus of operative facts." *Walker v. Anderson*, 232 S.W.3d 899, 912 (Tex. App.–Dallas 2007, no pet.); *In re Southmark Corp.*, 163 F.3d 925, 934 (5th Cir.1999). Like Texas, the Fifth Circuit has adopted the transactional test of the Restatement (Second) of Judgments in determining whether res judicata applies. *Test Masters*, 428 F.2d at 571. "Under the transactional test, a prior judgment's preclusive effect extends to all rights of the plaintiff with respect to all or any part of the transaction, or series of commercial transactions, out of which the original action arose." *Id.*

Here, the four elements under the federal standard are met. The record establishes that the parties to the federal suit are the same. Indeed, the instant suit was initially filed by Westbury and removed to federal court by the City. The record also establishes that the same state and federal due process claims made by Westbury framed the basis for the City's removal of the suit to federal court and they were still made in Westbury's live pleading in state court after the case was remanded back to state court. And Westbury acknowledges that they pleaded the same due process claims in both federal and state court.

The judgment in the federal suit was rendered by a court of competent jurisdiction. The City removed Westbury's lawsuit under 28 U.S.C. §§ 1331, 1343, and 1441. The federal district court had jurisdiction once Westbury raised a federal question asserting that their civil rights had been violated. 28 U.S.C. §§

1331, 1343. And the City was entitled to remove the case to federal court. 28 U.S.C. § 1441.

Westbury's claims of substantive and procedural due process violations were concluded by a final judgment that reached the merits of its claims. *See Test Masters*, 428 F.3d at 571. As noted by the federal district court, "Finally, [the City] argues that Plaintiffs' substantive and procedural claims fail on the merits. The Court agrees." *HDW2000 256 East 49th Street, L.L.C. v. City of Houston*, H-10-70, 2011 WL 722618 at *4 (S.D. Tex. Feb. 22, 2011).

Westbury argues that the federal district court judgment was not final because if it were, there would be nothing left for the state court to decide. Westbury misses the point. A federal district court's grant of summary judgment on all federal claims and remand of all remaining state law claims in a partial-summary judgment is an appealable final order because there is nothing left for the federal court to decide. *See* 11 MOORE'S FEDERAL PRACTICE GUIDE § 56.130[2][a]; *see Morris v. T.E. Marine Corp.*, 344 F.3d 439, 445 (5th Cir. 2003) (aspect of judgment that is distinct and separable from remand order is reviewable by federal appellate court); *Koch v. City of Del City*, 660 F.3d 1228, 1235 (10th Cir. 2011) (federal district court grant of summary judgment on federal claims and remanding remaining state law claims was final appealable order); *Porter v. Williams*, 436 F.3d 917, 919-20 (8th Cir. 2006) (remand of remaining state-law

claims, after the federal claims are resolved makes partial summary judgment a final order because there is nothing left for the federal district court to resolve).

In *Hyde Park Co. v. Santa Fe City Council*, the court noted that "[f]ederal appeals courts have consistently held . . . that they have jurisdiction to review a district court order dismissing federal claims on the merits where the district court subsequently exercised its discretion under [section] 1367 to remand supplemental state law claims to state court. Otherwise, a district court's order dismissing federal claims in such a situation would be effectively unreviewable." 226 F.3d 1207, 1209 n. 1 (10th Cir.2000) (citations omitted); *see also Guzman v. Mem'l Hermann Hosp. Sys.*, CIV.A. H-07-03973, 2009 WL 3837042 at *8 (S.D. Tex. Nov. 12, 2009).

As to the final element for res judicata requiring that the same cause of action must be involved, that is the case here. Again, the same due process claims raised by Westbury in the state court framed the basis for the City's removal of the suit to federal court, and the claims were still in Westbury's live pleading before the state court after remand of Westbury's state law claim for substantial evidence review of the Commission's decision.

We hold that the City met its summary-judgment burden of establishing that Westbury's due process claims are barred by res judicata. *See Adams v. Texas Bd. of Private Investigators and Private Sec. Agencies*, No. 03-96-00228-CV, 1997

WL 304172 at *4 (Tex. App.–Austin June 5, 1997, no writ) (holding that res judicata supported grant of summary judgment precluding federal claims that had been decided by federal court when case was remanded for consideration of state law claims).

Accordingly, we hold that the trial court did not err in granting the City summary judgment on Westbury's due process claims.

We overrule Westbury's second issue.

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Higley, and Sharp.

Affirmed in Part, Reversed and Remanded in Part, and Memorandum Opinion filed January 12, 2012.

In The

Fourteenth Court of Appeals

NO. 14-11-00051-CV

SECURE PROPERTIES, INC., Appellant

V.

CITY OF HOUSTON, Appellee

On Appeal from the 189th District Court
Harris County, Texas
Trial Court Cause No. 2010-13306

MEMORANDUM OPINION

Appellant Secure Properties, Inc. (SPI) petitioned the district court for judicial review of two orders issued by the City of Houston Building and Standards Commission. The district court signed a judgment affirming the Commission's decision, and SPI appealed to this court. We affirm in part, and reverse and remand in part.

BACKGROUND

Under the Texas Local Government Code subchapter entitled "Quasi-Judicial Enforcement of Health and Safety Ordinances," a municipality may provide for the

EXHIBIT "B"

appointment of a Building and Standards Commission to hear and determine cases concerning alleged violations of the municipality's health and safety ordinances. *See* TEX. LOC. GOV'T CODE ANN. §§ 54.031–.044 (West 2008 & Supp. 2011). The City of Houston's Building and Standards Commission conducts administrative hearings pursuant to this authority. *See generally* Houston, Tex., Code of Ordinances ch. 10, art. IX, §§ 10-341–360 (2011) (formerly §§ 10-391–410).

SPI owns rental property consisting of two wood-framed buildings at 2308 and 2310 Winbern Street in Houston, Texas. On January 15, 2010, the City gave SPI written notice that the Commission would hold a public hearing concerning alleged violations of the Houston Code of Ordinances on the property on February 3, 2010. The notice informed SPI that it could present evidence and witnesses concerning the alleged violations at the hearing.

SPI alleges that prior to the hearing, City officials gave SPI president Christopher Hageney inconsistent information about whether the hearing should be postponed pursuant to City policy. SPI does not argue that it received written or verbal confirmation that the hearing was cancelled or rescheduled.

Hageney appeared at the hearing on behalf of SPI, confirmed that he received notice of the hearing, and requested a continuance. The Commission denied the request. The City then presented photographs and testimony regarding the alleged violations. Hageney did not cross-examine the City's witness or introduce any evidence.

The City recommended the following deadlines for remediation of the Building 1 violations: 10 days to obtain permits to secure the structure to specifications; 10 days to obtain repair or demolition permits; and 30 days to repair or demolish the structure. The City recommended the following deadlines for remediation of the Building 2 violations: 10 days to obtain repair permits; and 30 days to repair the structure. In response, Hageney informed the Commission that he needed at least 90 days to get bids from contractors, obtain the permits, and complete the repair work on the two buildings.

In two separate orders, the Commission (1) found that notice was properly given; (2) concluded that both Building 1 and 2 were in violation of numerous Code of Ordinances provisions; (3) adopted the City's recommendation for the repair or demolition of Building 1; and (4) gave SPI 15 days to obtain repair permits and 60 days to repair Building 2. The Commission informed Hageney: "I think if you work with the City on this . . . they can work and adjust the time sometimes when you're showing good effort."

SPI petitioned the district court for judicial review of the Commission's decision on March 1, 2010. SPI invoked the district court's inherent authority to review SPI's complaint that the Commission's actions violated SPI's constitutional rights, as well as the district court's authority to review the Commission's findings for "substantial evidence" pursuant to section 54.039 of the Texas Local Government Code. *See* TEX. LOC. GOV'T CODE ANN. § 54.039. Specifically, SPI claimed that the Commission's orders should be reversed because (1) the Commission's denial of SPI's request for a continuance violated SPI's procedural due process rights because "SPI was notified [by City officials] that the hearing would be reset"; and (2) the Commission's findings are not "reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole."[1]

The City filed a summary judgment motion, arguing that it was entitled to judgment as a matter of law on SPI's arguments. The district court granted summary judgment in favor of the City, effectively affirming the Commission's decision.

In four issues on appeal, SPI argues that (1) the district court's judgment is erroneous to the extent that it applied the wrong standard of review to SPI's procedural due process challenge; (2) the City failed to show entitlement to a ruling as a matter of law that the Commission's actions did not violate SPI's procedural due process rights, and the evidence conclusively establishes a procedural due process violation; (3) the

[1] SPI listed additional grounds for challenging the legality of the Commission's decision, but SPI does not appeal the district court's rejection of those arguments.

Commission's factual findings regarding the ordinance violations are not supported by substantial evidence; and (4) the procedural due process violation was not remedied by the City's offer in the district court to agree to a proposed judgment remanding the case for a rehearing, because SPI was entitled to a *de novo* hearing.

ANALYSIS

I. Standards and Authority for Judicial Review **of the Commission's Decision**

The right to appeal the decision of an administrative body exists if (1) such right is statutorily created, or (2) the complained-of action violates a person's constitutional rights. *See Firemen's & Policemen's Civil Serv. Comm'n of City of Fort Worth v. Kennedy*, 514 S.W.2d 237, 239 (Tex. 1974) ("[A]n inherent right of appeal from an administrative body created by an act silent on the question will be recognized only where the administrative action complained of violates a constitutional provision."); *see also Smith v. Nelson*, 53 S.W.3d 792, 795 (Tex. App.—Austin 2001, pet. denied) ("[T]here is no automatic right to appeal an administrative decision that does not violate the appealing party's constitutional rights; such a right to appeal exists only if legislatively granted.").

Both types of judicial review are authorized in this case, and each involves a separate inquiry governed by a separate standard of review. *See* TEX. LOC. GOV'T CODE ANN. § 54.039 (authorizing appeal to district court for judicial review of Commission decisions for a hearing under substantial evidence rule); *Lewis v. Metro. Sav. & Loan Ass'n*, 550 S.W.2d 11, 15–16 (Tex. 1977) (holding that a reviewing court's conclusion that administrative body's factual findings are supported by substantial evidence does not preclude separate inquiry into whether the administrative body acted so arbitrarily as to violate a party's right to due process); *Perkins v. City of San Antonio*, 293 S.W.3d 650, 653 n.2 (Tex. App.—San Antonio 2009, no pet.) ("We note . . . that in addition to reviewing whether substantial evidence supports the Board's order, an arbitrary action of an administrative agency cannot stand, including any action that deprives a party of due process; therefore, the trial court also is permitted to consider whether the proceedings

before the Board satisfied the requirements of due process.").

To survive appeal, administrative proceedings must meet the federal and state constitutional requirements of due process of law and the rudiments of fair play. *See Granek v. Tex. State Bd. of Med. Exam'rs*, 172 S.W.3d 761, 772 (Tex. App.—Austin 2005, no pet.) (citing *Tex. Health Facilities Comm'n v. Charter Med.—Dallas, Inc.*, 665 SW.2d 446, 454 (Tex. 1984)); *Grace v. Structural Pest Control*, 620 S.W.2d 157, 160 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.). Administrative hearings are not required to measure up to judicial standards, but even administrative hearings must not be so arbitrary or inherently unfair that they deny the parties due process of law. *City of Arlington v. Centerfolds, Inc.*, 232 S.W.3d 238, 250 (Tex. App.—Fort Worth 2007, pet. denied) (citing *City of Corpus Christi v. Pub. Util. Comm'n*, 51 S.W.3d 231, 262 (Tex. 2001)); *Grace*, 620 S.W.2d at 160 (citing *Lewis*, 550 S.W.2d at 15–16). A claim regarding the deprivation of constitutional rights by an administrative proceeding presents a question of law subject to *de novo* review on appeal. *See Lee v. City of Houston*, No. 14-05-003366-CV, 2006 WL 2254401, at *3 (Tex. App.—Houston [14th Dist.] Aug. 8, 2006, pet. denied) (citing *Granek*, 172 S.W.3d at 771–72).

Additionally, any owner aggrieved by a Building and Standards Commission decision may present a petition to a district court seeking judicial review of the Commission's findings under section 54.039 of the Texas Local Government Code. *See* TEX. LOC. GOV'T CODE ANN. § 54.039(a). The district court "may allow a writ of certiorari directed to the commission panel to review the decision." *Id.* § 54.039(b). The district court's judicial review under this provision "shall be limited to a hearing under the substantial evidence rule," and the district court "may reverse or affirm, in whole or in part, or may modify" the Commission's decision. *Id.* § 54.039(f). When conducting a substantial evidence review, the reviewing court must affirm an administrative order supported by any quantum of evidence greater than a scintilla. *R.R. Comm'n of Tex. v. Torch Operating Co.*, 912 S.W.2d 790, 792–93 (Tex. 1995). Whether substantial evidence supports the Commission's decision is a question of law; therefore, we perform

our substantial evidence review *de novo* without deference to the district court's conclusion on the same issue. *See Lee*, 2006 WL 2254401, at *2 (analyzing identical "substantial evidence" judicial review provision applicable to municipality decisions regarding dangerous structures, as authorized by Texas Local Government Code sections 214.001–.005 (citing *Tex. Dep't of Pub. Safety v. Jackson*, 76 S.W.3d 103, 106 (Tex. App.—Houston [14th Dist.] 2002, no pet.))).[2]

With these standards of review in mind, we address each of SPI's issues out of order.

II. SPI's Challenges to the District Court's Judgment

A. Procedural Due Process

SPI argues in Issue 2 that the district court erred in concluding that SPI's procedural due process rights were not violated. Specifically, SPI complains that (1) the City failed to make any legal arguments regarding certain factors relevant to a procedural due process analysis; and (2) the undisputed evidence establishes a procedural due process violation.

The City presented the district court with relevant authority and correctly explained that "[p]rocedural due process requires reasonable notice and the opportunity to be heard at a meaningful time and in a meaningful manner." *See Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 930 (Tex. 1995). The City's argument to the district court was supported by the following undisputed facts: Hageney (1) received written notice, (2) appeared at the hearing, and (3) had an actual opportunity to be heard, cross-examine witnesses, and present evidence. The City concluded that SPI's due process rights were not violated because "[t]he [r]ecord conclusively establishes that [SPI] received

[2] This standard of review is not inconsistent with the *de novo* standard of review applicable to a trial court's conclusion that the movant is entitled to summary judgment "as a matter of law." *See* TEX. R. CIV. P. 166a(c); *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). The parties do not challenge and we do not review the propriety of the City's use of summary judgment procedures to resolve the exclusively legal questions that are raised in an appeal from an administrative hearing to a district court. However, we note that the City conceded at oral argument that it since has abandoned the use of summary judgment procedures to resolve such appeals.

reasonable notice of the hearing and an opportunity to be heard—at a meaningful time and in a meaningful manner."

SPI contends that the City's argument is incomplete because "[e]xactly what constitutes due process in a given situation is measured by a flexible standard that depends on the practical requirements of the circumstances." SPI argues that the City should have addressed this "flexible standard" and analyzed the three factors relevant to its application: (1) the private interest affected by the state action; (2) the risk of erroneous deprivation of a constitutionally protected interest under the procedures used and the likely benefit of any additional procedures; and (3) the government's interest, including the fiscal and administrative burdens, that additional or substitute procedural requirements would entail. *See Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976); *Than*, 901 S.W.2d at 930. SPI complains that the City did not show entitlement to judgment as a matter of law because the City failed to identify or present evidence regarding these factors.

Because SPI does not seek the imposition of additional or substitute procedures contemplated by the *Mathews/Than* factors, the City had no need to address them in its argument to the district court. *See Mathews*, 424 U.S. at 333, 349 (recipient of disability benefits would have been provided with evidentiary hearing had he sought reconsideration of administrative decision to terminate benefits, and due process did not additionally require evidentiary hearing prior to that decision); *Than*, 901 S.W.2d at 932 (student was provided notice and opportunity to be heard prior to disciplinary dismissal, but due process additionally required hearing officer to grant student's request to be present during presentation of evidence against him unless other circumstances justified ex parte presentation of evidence). SPI does not challenge the sufficiency of the written notice received by Hageney or argue that the Commission's existing hearing procedures actually prevented Hageney from having an opportunity to be heard, present evidence, or cross-examine witnesses. Rather, SPI argues that the Commission's denial of Hageney's request for a continuance—after he made it known to the Commission that he was

unprepared because he "was told [the hearing] would not go forward by the City's representatives"—deprived SPI of its due process right to a meaningful opportunity to be heard and "to present its objections to the testimony of the City, present controverting evidence, and cross examine witnesses." We conclude that the City's legal arguments to the district court on this issue were sufficient.

SPI also argues that the district court's judgment is erroneous because the evidence conclusively establishes that SPI suffered a procedural due process violation.[3] Not every denial of a requested continuance constitutes an effective denial of a constitutionally-guaranteed due process right. *See State v. Crank*, 666 S.W.2d 91, 94–95 (Tex. 1984) (concluding that under the circumstances, the administrative body's denial of continuance did not effectively deprive Crank of his "due process rights to fair representation"). "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process," and such a determination depends on the circumstances in each case. *Id.* (civil appeal from order of the state Board of Dental Examiners revoking Crank's license; applying rule to administrative body's denial of Crank's request for continuance (citing *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964))). The circumstances in this case do not reveal a procedural due process violation.

SPI president Hageney appeared at the hearing on behalf of SPI and requested additional time to prepare:[4]

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[3] SPI also argues that, at a minimum, the uncontested summary judgment evidence "raises a genuine issue of material fact" regarding its asserted procedural due process violation. The issue of whether the Commission violated SPI's procedural due process rights is a legal question, not a factual one. *See Lee*, 2006 WL 2254401, at *3 (citing *Granek*, 172 S.W.3d at 771–72). No other "factual issue" exists because, as SPI points out, the City does not dispute SPI's version of the events relevant to this legal inquiry. We therefore reject this additional argument for reversing the district court's judgment.

[4] These excerpts are taken from a purported transcript of a recording taken at the administrative hearing, which was attached as an exhibit to the City's summary judgment motion. SPI does not challenge the City's characterization of this or any other exhibit to its motion as a true copy taken from the certified record of the administrative hearing. The certified record of the administrative hearing does not actually appear in the clerk's record as a return on the trial court's writ of certiorari. However, neither party assigns error to this point. Therefore, for purposes of this appeal, we accept the record as true and complete.

I've been in communication with [the City] and I wasn't prepared. I was told to come down here and say that the repairs were on their way. So I didn't bring any photos or any evidence on my behalf. . . . [A]s soon as I received that, I did start calling you. So I'm not — I just — I would like, you know, as my right to have time to reset and to continue the repairs. I'm an owner here trying to comply.

* * *

I did receive the certified notices[,] which is why I'm here.

* * *

What I'm saying is prior to receiving that notice, prior to receiving the notice to come to [the] hearing, I didn't realize I was under any violation. I didn't — I received a notice saying come to a hearing. I immediately called, met an inspector. I understand that your process hasn't change[d]. I would be contacted[,] whether by certified mail or whatever. And I would go out and meet an inspector. The inspector would say I want these repairs done. And it happened on this property in 2005 when the inspector signed off [without a hearing]. . . . So I would like the opportunity — you have an owner here trying to comply. I'd like the opportunity to continue to continue with what we're doing. We only met one week ago and already probably a significant portion or a third or half of the repairs are done. I will have the rest of them done within the 90-day period.

* * *

I have no photos and nothing to offer as evidence. And I would have come — I would have taken a different tact [sic] as opposed to trying to immediately comply with the recommendation. I received a notice to come to this hearing. What is my understanding is normal is to receive a notice that I'm in violation, to go meet the inspector and try to comply before you go to [a] hearing. I haven't been afforded that. I'm just asking that if — can I continue to do the repairs?

* * *

I think there's a difference in the way — in the manner in which I . . . do the repairs after the hearing takes place. I'm never — I've been in real estate and worked with this organization for many years under many different directors. I've never been to [a] hearing and I've always — I have been cited on things in the past and I have always complied and I've never been to [a] hearing. I was not afforded that possibility under this scenario.

* * *

> I was under the understanding that was what was going to happen or else I would have taken photos and have bids and been able to tell you that I can complete these repairs within this period of time. I — I don't have any information.[5]

The Commission voted to deny SPI's request for a continuance.

During SPI's appeal to the district court, SPI proffered for the first time an affidavit by Hageney, in which he states that a City official told Hageney that the hearing should not have been scheduled because "the City has a policy of not scheduling hearings with property owners who are attempting to comply with violations."[6] Hageney states that the official informed Hageney that if he met with inspectors and had the repairs underway, the scheduled hearing would be "postponed" for 60 days. Hageney followed these instructions. He attended a meeting with City officials on the day of the hearing, where he learned that the City intended to go forward with the hearing because the file contained no notation that the hearing should be postponed "according to the agreement between SPI and the City." After that meeting, a City inspector told Hageney, "[D]on't worry, we will take care of this." An hour or two later, the official who originally discussed the City's policy with Hageney told him that she noted that the hearing "should be postponed" in an email, and instructed Hageney to ask for additional time "to instigate repairs." In response, the City informed Hageney that it planned to "recommend" an additional 60 days for SPI "to instigate repairs." Hageney characterizes the City's decision to "go forward with the hearing" as a violation of its asserted promise to

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[5] When the Commission noted that it had the option to give SPI a 90-day compliance period at the end of the hearing, Hageney explained why this solution was not a sufficient alternative to a continuance: "The difference would be that I would have to get a different set of permits if we go through with this hearing. . . . [I would have to get an] occupancy permit[,] which would require me to bring the entire property up to code as opposed to repairing the damages that they have."

[6] The parties dispute on appeal whether the district court's review of SPI's procedural due process complaint was limited to the record developed at the administrative level, or if the parties could adduce new evidence for the first time on appeal to the district court. SPI complains that the City failed to preserve this issue because it failed to object to Hageney's affidavit in the district court. We do not decide either issue because we can affirm the district court's judgment by assuming without deciding that the district court properly could have considered the newly adduced evidence. *See* TEX. R. APP. P. 47.1 ("The court of appeals must hand down a written opinion . . . that addresses every issue raised and necessary to final disposition of the appeal.").

"postpone" the hearing or "recommend" an additional time for repairs.

We do not agree that these circumstances indicate that the Commission's denial of SPI's motion for continuance was arbitrary, an abuse of discretion, or an effective denial of SPI's due process right to an opportunity to be heard at a meaningful time and in a meaningful manner. *See Crank*, 666 S.W.2d at 94–95. SPI unequivocally admits that it had notice of the hearing, and it does not contend that any City officials ever confirmed that the hearing was postponed according to "policy" in response to SPI's remedial actions. The fact that SPI met with City officials to discuss the status of the postponement on the day of the hearing, as well as the fact that SPI actually attended the hearing and requested additional time, belies SPI's implied contention that it relied on the City's assurances and believed the hearing to be effectively postponed before the date of the hearing. That SPI chose to attend the hearing empty-handed because it assumed its request for continuance would be granted does not affect our analysis. *Cf. Ezeoke v. Tracy*, 349 S.W.3d 679, 687 (Tex. App.—Houston [14th Dist.] 2011, no pet.) ("A lawyer who gambles by requesting a continuance and then leaving the country before the request has been ruled on reasonably can anticipate adverse consequences."). Accordingly, we do not agree with SPI that the evidence establishes a procedural due process violation.

We overrule SPI's Issue 2.[7]

B. Substantial Evidence

SPI argues in Issue 3 that substantial evidence does not support the Commission's findings that SPI's property was in violation of certain Code of Ordinances provisions.

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[7] SPI argues in Issue 1 that the district court erred "to the extent that" it relied on the "substantial evidence rule" as the applicable standard of review for its procedural due process argument. Nothing in the record indicates that the district court applied an incorrect standard; the City's motion does not urge and the district court's order does not recite an incorrect standard. Additionally, because we can affirm the district court's conclusion by applying the correct standards in our *de novo* review of SPI's challenges to the Commission's decision, we also overrule Issue 1. SPI argues in Issue 4 that the City's offer to agree to a proposed judgment remanding the case for a rehearing did not remedy the asserted procedural due process violation. Because we conclude that no procedural due process violation occurred, we also overrule Issue 4.

Texas recognizes a range of standards for reviewing administrative findings: (1) pure trial *de novo*; (2) pure substantial evidence; and (3) substantial evidence *de novo*. *Perkins*, 293 S.W.3d at 653. We review the Commission's decision under the pure substantial evidence rule, which authorizes the reviewing court to consider only the factual record made before the administrative body and determine if its findings are reasonably supported by substantial evidence. *See* TEX. LOC. GOV'T CODE ANN. § 54.039(f); *Perkins*, 293 S.W.3d at 653.

"Substantial evidence review resembles legal sufficiency review." *See Dozier v. Tex. Emp't Comm'n*, 41 S.W.3d 304, 309 (Tex. App.—Houston [14th Dist.] 2001, no pet.). "Substantial evidence" is defined as evidence amounting to more than a mere scintilla. *Tex. Health Facilities Comm'n*, 665 S.W.2d at 452 (citing *Alamo Express, Inc. v. Union City Transfer*, 309 S.W.2d 815, 823 (1958)). Under substantial evidence review, the evidence in the record actually may preponderate against the decision of the agency and nonetheless amount to substantial evidence. *Id.* (citing *Lewis*, 550 S.W.2d at 13). "The true test is not whether the agency reached the correct conclusion, but whether some reasonable basis exists in the record for the action taken by the agency." *Id.* at 452–53 (citing *Gerst v. Nixon*, 411 S.W.2d 350, 354 (Tex. 1966)). Administrative findings, inferences, conclusions, and decisions are presumed to be supported by substantial evidence, and the burden is on the appellant to prove otherwise. *Id.* at 453; *Tex. Alcoholic Beverage Comm'n v. Mini, Inc.*, 832 S.W.2d 147, 150 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

The Commission found that Building 1 was in violation of the terms of the City of Houston's Code of Ordinances Section 10-361(a)(3), (a)(11), and (b)(2), as well as Section 10-343(b)(4), (c)(9), and (e)(3).[8] These subsections concern buildings that are not weathertight and waterproof; secured from unauthorized entry to the extent that vagrants, uninvited persons, or children could enter; free of holes that constitute health or

[8] The Commission also found that Building 1 was in violation of Section 10-343(c)(4), but SPI does not challenge that finding on appeal.

safety hazards or that would allow insects and other pests to gain access to the extent constituting a present hazard to health or safety; or free of interior rubbish and garbage. *See* Houston, Tex., Code of Ordinances ch. 10, art. IX, §§ 10-361, 10-343 (2002) (current versions at §§ 10-371, 10-363). The Commission found that Building 2 was in violation of the terms of the City of Houston's Code of Ordinances Section 10-343(c)(1), (c)(4), and (c)(9). These subsections concern buildings that are not protected on the exterior from decay; weatherproof and watertight; or free of holes that constitute health or safety hazards. *See id.* § 10-343 (2002) (current version at § 10-363).[9] SPI challenges each of these findings under the substantial evidence rule.

With respect to Building 1, City inspector Cherie Strong testified to her observations based on her inspection of the property the morning of the hearing:

> The structure . . . was vacant and open with partially boarded windows and doors. A few of the windows[,] the boards had been removed and there were — the pane was broken — the window pane was broken in the windows rendering the property not weathertight or waterproof and also rendering it open to the elements.
>
> The exterior of the structure is deteriorating — deteriorating where the wall studs are starting to — or being exposed to the elements of nature. The structure is — the property is posted no trespassing so I wasn't able to get onto the property and get any interior shots.
>
> * * *

[9] Section 10-361(a)(3) and (a)(11) define a structure as a dangerous building if the "[r]oofs or walls . . . are not weathertight or waterproof" or if it has "been left unsecured from unauthorized entry to the extent that [it] may be entered by vagrants or other uninvited persons as a place of harborage or could be entered by children." Houston, Tex., Code of Ordinances ch. 10, art. IX, § 10-361(a)(3), (a)(11) (2002). Section 10-361(b)(2) states that a building that "is boarded up, fenced or otherwise secured in any manner" nonetheless constitutes a dangerous building if "[t]he building's roof, walls or floor contains holes that would allow insects, ectoparasites, rodents or other pests to gain access to the building for harborage to the extent constituting a present hazard to health or safety." *Id.* § 10-361(b)(2). Sections 10-343(b)(4), (c)(1), (c)(4), (c)(9), and (e)(3) require owners to "[k]eep the doors and windows of a vacant building . . . securely closed to prevent unauthorized entry"; "[p]rotect the exterior surfaces of a building reasonably subject to decay by application of a protective covering, coating or other preservative"; "[m]aintain a building intended for human occupancy . . . in a weatherproof and watertight condition"; "[r]epair holes, cracks, breaks and loose surface materials that are health or safety hazards in or on floors, walls, ceilings, porches, steps and balconies"; and "[m]aintain the interior of a vacant building . . . free from rubbish and garbage." *Id.* § 10-343(b)(4), (c)(1), (c)(4), (c)(9), (e)(3).

You could see where the exterior of the property is starting to mold and it has mildew on it where the asbestos is starting to decay. . . . You can see there where the exterior is deteriorated. You got [sic] broken windows, open windows, where it's been partially boarded. More open windows which are allowing for the elements of nature to enter into the structure.

Second floor, more open windows there were at one time partially boarded. . . . [T]he exterior . . . is deteriorating and exposing the wall studs.

* * *

This morning when I went out to the property, the property had . . . been boarded a little bit — secured a little bit better with boards placed over the windows that were open or broken. As far as the repairing to the exterior of the other property, it has not been done.

With respect to Building 2, Strong testified to her observations based on her inspection of the property the morning of the hearing:

[T]he property is occupied. It's an occupied multi-dwelling and the property is posted no trespassing so I wasn't able to get onto the property to get any interior shots. But the exterior of the property is starting to deteriorate where the — you could see there's possibly termite damage done to the exterior of the property where the walls — the exterior wall covering has deteriorated[,] exposing the wall studs to the elements of nature and it was all around the property — all around the building.

Around the headers and the window sills around the windows are starting to deteriorate where apparently there is termite damage which would render the property not weather tight or waterproof.

* * *

[There is] more deterioration of the exterior of the property and you can see where it's possible termite damage there. . . . [Y]ou see the deterioration of the exterior of the covering on the wall, exposing the wall studs to the elements of nature. . . . [Y]ou can tell that there's termite damage on the property that's been done to the exterior walls. And around the windows you can see is there where it's deteriorated, where the sill is deteriorated, and the headers are starting to deteriorate . . . rending it not weather tight and weatherproof.

[There is] more deterioration where the exterior is basically nonexistent, exposing the wall studs. Deterioration around the window and above the gable there is some deterioration above the gable that has been

partially repaired but not completely repaired.[10]

The City also introduced a number of photographs of the property showing exterior damage to the buildings. The electronic date stamp on these photos ranges from July 2004 to January 2010. When asked whether the photographs "represent those structures," Strong answered, "Yes, sir, they do."

The Commission inquired whether SPI had done any repairs to the buildings, and Hageney answered:

> One of the pictures will show the roof was — will indicate we replaced the roof at a cost of about $12,000. . . . [W]e secured the front building — no. Some. You saw some HardiPlank put up there. Yeah. Some of the HardiPlank. But the front building has been the issue because it's vacant and it's been boarded. And what will happen is, for whatever reason, people take the boards off.
>
> * * *
>
> But there's some — there's some deterioration on the exterior.
>
> * * *
>
> [Y]ou can see where we replaced the roofs on both of them and replaced the facia. We haven't gone around — but down below on the right-hand side you can see where we replaced some HardiPlank.
>
> * * *
>
> That's an old photo. That's been repaired. That would have been one from before. All that's been repaired.[11] So the exterior does have some places where the siding is off, the windows are in disrepair, and some of that trim around the windows needs to be replaced as we discussed.

We conclude that the record from the hearing contains more than a scintilla of evidence that Building 1 was not weathertight and waterproof; secured from unauthorized entry to the extent that vagrants, uninvited persons, or children could enter; or free of holes that constitute health or safety hazards or that would allow insects and other pests

[10] The transcript indicates that a video of Strong's inspection may have been played for the Commission as Strong narrates. The City did not include the video in its summary judgment evidence and does not argue that we could view it if it had been included in the record on appeal.

[11] The record does not indicate which photo Hageney was discussing.

to gain access to the extent constituting a present hazard to health or safety. *See id.* § 10-361(a)(3), (a)(11), (b)(2); *id.* § 10-343(b)(4), (c)(9); *see also Tex. Health Facilities Comm'n*, 665 S.W.2d at 452. We also conclude that the record from the hearing contains more than a scintilla of evidence that Building 2 was not protected on the exterior from decay; weatherproof or watertight; or free of holes that constitute health or safety hazards. *See* Houston, Tex., Code of Ordinances ch. 10, art. IX, § 10-343(c)(1), (c)(4), (c)(9) (2002); *see also Tex. Health Facilities Comm'n*, 665 S.W.2d at 452. However, the Commission heard no evidence regarding whether SPI had kept the interior of Building 1 "free from rubbish and garbage" pursuant to Section 10-343(e)(3). *See* Houston, Tex., Code of Ordinances ch. 10, art. IX, § 10-343(e)(3) (2002). We sustain SPI's Issue 3 to that extent and overrule Issue 3 in all other respects.

CONCLUSION

We reverse the district court's summary judgment on the issue of whether substantial evidence supports the City of Houston Building and Standards Commission's finding that SPI failed to keep the interior of Building 1 "free from rubbish and garbage" pursuant to Houston Code of Ordinances section 10-343(e)(3); we remand that issue to the district court for proceedings consistent with this opinion. We affirm the district court's summary judgment in all other respects.

/s/ Sharon McCally
Justice

Panel consists of Justices Brown, Boyce, and McCally.