

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
=====

ON MOTION FOR REHEARING

JUSTICE GUZMAN, dissenting from the denial of rehearing.

Abandoned buildings, dilapidated homes and hazardous properties have in many instances become a haven for vagrants, criminal activity and potential hazards to surrounding neighborhood properties. The Court’s holding and today’s denial of the Motion for Rehearing in effect have essentially decimated summary nuisance abatement—a city’s crucial, front-line tool to combat the detrimental effects of nuisance on the health, safety, and welfare of its citizens.¹ The Court’s holding leaves municipalities with equally incongruous options after a determination of public

¹ *City of Dallas v. Stewart*, ___ S.W.3d ___, ___ (Guzman, J., dissenting); see Melissa C. King, *Recouping Costs for Repairing “Broken Windows”: The Use of Public Nuisance by Cities To Hold Banks Liable for the Costs of Mass Foreclosures*, 45 TORT TRIAL & INS. PRAC. L.J. 97, 99–100 (2009).

nuisance is made by a municipal board: (1) subject the municipality's tax-payers to the otherwise unnecessary and costly litigation of a de novo trial to determine whether the property is a public nuisance; or (2) accept the board's determination, abate, and subject the municipality to a potentially costly takings claim.

Underscoring the risk to the safety and vitality of entire communities, the City of Dallas urges this Court to vacate its holding. Twelve separate amicus briefs have been submitted in support of the Motion for Rehearing.² Amici assert that the Court's decision restricts the ability of municipalities to control and regulate nuisances through their police power and in turn restricts municipalities from protecting their communities' health and safety.³ Evidencing the debilitating effects the Court's holding has had in the mere six months since it was handed down, many cities

² The Texas Municipal League (TML), Texas City Attorneys Association (TCAA), and the International Municipal Lawyers Association (IMLA), as well as the cities of Abilene, Aledo, Cleburne, Euless, Fort Worth, Garland, Granbury, Grapevine, Haltom City, Houston, Hurst, Iving, Kennedale, Lake Worth, McAllen, Mesquite, North Richland Hills, River Oaks, Saginaw, San Antonio, Southlake, and Sulphur Springs submitted a total of twelve amicus curiae briefs in support of the City of Dallas's Motion for Rehearing.

³ Brief in Support of Petitioner's Motion for Rehearing for Amicus Curiae, City of Abilene at 8–9, *Stewart*, No. 09-0257 (Tex. Aug. 31, 2011); Brief of Amicus Curiae, the City of Garland, in Support of the City of Dallas's Motion for Rehearing at 1, *Stewart*, No. 09-0257 (Tex. Oct. 13, 2011); Brief of Amicus Curiae, IMLA, in Support of Petitioner's Motion for Rehearing at 13, *Stewart*, No. 09-0257 (Tex. Aug. 23, 2011); Amicus Curiae Brief of the City of Irving in Support of Motion for Rehearing at 10–11, *Stewart*, No. 09-0257 (Tex. Aug. 19, 2011); Brief of Amicus Curiae the City of Sulphur Springs, Texas in Support of Petitioner City of Dallas's Motion for Rehearing at 5, *Stewart*, No. 09-0257 (Tex. Sept. 1, 2011); Brief of Amicus Curiae TML & TCAA in Support of Petitioner City of Dallas's Motion for Rehearing at 2–3, *Stewart*, No. 09-0257 (Tex. Aug. 23, 2011).

have brought their substandard structure and nuisance enforcement procedures to a stand-still.⁴ And many are concerned that this new requirement will delay an already agonizingly slow process.⁵

I believe the cities' concerns warrant closer examination. But, despite the rapid manifestation of the broad-sweeping effects I cautioned about in my dissent, this Court adheres to its untenable holding—despite long-standing precedent dictating otherwise⁶—that a party whose real property has been determined a nuisance is entitled to an absolute right to de novo judicial review

⁴ See, e.g., Laura Mueller, *City of Dallas v. Stewart: Divided Supreme Court of Texas Holds That Nuisance Decisions Should Be Made by Courts Rather Than City Boards*, TEX. CITY ATTORNEYS ASS'N NEWS, June/July 2011, at 3, available at http://www.tml.org/legal_tcaanews/News-June-July2011.pdf (stating many cities have halted their nuisance ordinance enforcement until this rehearing is decided) (all Internet materials as visited January 25, 2012 and copy in Clerk of Court's file); Rudolph Bush, *Texas Supreme Court Wants To Hear More About Dallas's Demolition of 'Nuisance' Property*, DALLAS MORNING NEWS, Oct. 20, 2011, available at <http://cityhallblog.dallasnews.com/archives/2011/10/texas-supreme-court-wants-to-h.html> (noting that “[m]any, if not all, of those cities have since stopped destroying nuisance properties absent a court order”); Brief of Amicus Curiae the City of Sulphur Springs, Texas in Support of Petitioner City of Dallas's Motion for Rehearing at 10, *Stewart*, No. 09-0257 (Tex. Sept. 1, 2011) (stating that the city's program to eliminate dangerous and unhealthy structures has ceased as a direct consequence of this Court's holding).

⁵ See, e.g., Ken Fountain, *The Hazard Next Door: Texas Ruling Restricts Cities from Eliminating Blighted Structures*, BELLAIRE EXAMINER, Aug. 11, 2011, available at http://www.yourhoustonnews.com/bellaire/news/article_ea69abc2-115b-5edf-9972-7d4ffc16706e.html (indicating that proceeding with demolition after a board's determination opens the municipality to potential costly litigation); Patricia Kilday Hart, *Hart: Whose Property Rights Are Being Protected?*, THE HOUSTON CHRONICLE, Jan. 7, 2012, available at <http://www.chron.com/news/kilday-hart/article/Hart-Whose-property-rights-are-being-protected-2448385.php> (suggesting the Court's opinion “has made it more difficult for municipalities to order demolitions of abandoned nuisances,” noting that demolition orders—following a nuisance finding by the municipal board—are now likely to only be acted upon when public health and safety risks outweigh the exposure of a takings claim).

⁶ See *Stewart*, ___ S.W.3d at ___ (Guzman, J., dissenting) (explaining that the Court has always recognized the Legislature's capacity to define and abate nuisances and provide for a different standard of review of such abatement).

of the underlying nuisance determination made by an administrative board when the person alleges a taking.

Because the Court's decision essentially strips municipalities of their legislatively provided tool to combat public nuisance, I would grant the motion for rehearing. Because the Court declines to do so, I respectfully dissent.⁷

Eva M. Guzman
Justice

OPINION DELIVERED: January 27, 2011

⁷ See *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 24–29 (Tex. 2007) (Brister, J., dissenting to the denial of rehearing).