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Extern! Extern! Read All About Them!

Law schools want to place them, law students seek the opportunity, and local government law offices can benefit.



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Demolitions and Due Process: Galveston's Housing Abatement Program

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Senior Assistant City Attorney, Galveston, Texas



INTRODUCTION

I cannot think of any city that does not have at least one house or property that is dangerous, unsanitary, deteriorated, run down, and unsightly. Whatever the issue, the city wants it repaired or gone. Galveston is no exception. In 2008, our city was devasted by Hurricane Ike. The number of vacant, dilapidated, substandard, and dangerous properties increased. Some owners repaired, demolished or rebuilt their properties; however, there were many that did not. Absentee ownership and abandonment of properties exacerbated the city's problems, which resulted in many areas of blight.

A solution: After Hurricane Ike, the task was how best to address the issues of the large number of properties that remained damaged, destroyed, vacant, or otherwise substandard. Many properties were badly deteriorated, dangerous, unsanitary, or were attractive nuisances. They posed substantial threats to the health and safety of the city and its population. Demolition of these properties became a necessary evil when owners were not able to repair or abate them, or refused to do so. A formal city demolition program was necessary before the city took the reins to destroy a person's property that was timely, effective and constitutionally sound. The City of Galveston's Housing Abatement Program was specifically developed to handle these problem properties.

Constitutional considerations: While a city has to deal with the myriad problems resulting from derelict properties, and demolition seems like a quick fix, the constitutional rights of property owners cannot be overlooked.

Section 1983 (42 U.S.C. § 1983) provides the right of an individual to sue persons "acting under color of state law" for civil rights violations. The necessary elements of a Section 1983 claim are:

1. The conduct complained of was committed by a person acting under the color of state law; and
2. The conduct deprived the plaintiff of rights, privileges or immunities secured by the Constitution or the laws of the United States.

Likely Section 1983 claims that result from the demolition of a person's property are alleged violations of:

- The Fourth Amendment protections against unreasonable search and seizure and of substantive due process. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized;[1]
- The Fifth Amendment protection against unlawful takings. "No person shall…be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation;"[2] and
- The Fourteenth Amendment protections of due process and the equal protection of the laws. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[3]

The Texas Constitution similarly provides these protections, and reads in part:

- Takings - "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation."[4]
- Due Process - "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land."[5]

Due Process safeguards: Texas courts, including the Fifth Circuit have articulated fundamental mechanisms for cities to prevent violations of Section 1983 rights, and how to ensure successful outcomes when a city is

accused of those violations.

Procedural due process requires notice and an opportunity to be heard. Due Process requirements of the Fourth and Fourteenth Amendments require notice and an opportunity to be heard at a meaningful time and in a meaningful manner.[6] The Supreme Court has held that deprivations of property rights do not violate the Due Process Clause if adequate and meaningful opportunity to be heard has been provided.

Substantive due process bars certain government actions deemed arbitrary or conscience shocking.[7] In order to withstand such claims, a city must ensure that its ordinances or laws governing demolition of nuisance property provide safeguards not only against procedural shortcomings but also against substantive violations.

Notice: A principal safeguard to ensure due process is by providing appropriate and accurate notice. Proper notice must:

- be to the owner, lien holder, or mortgagee of the property,
- provide for a public hearing to determine whether the property complies with the regulations set out in the city's ordinance, and
- include a statement that the owner is required to submit proof of the scope of work and a reasonable timeframe to comply with the city ordinance.[8]
- be personally delivered, sent by certified mail with return receipt requested, or delivered by U.S postal service.[9]
- contain an identification and location of the subject property, a description of the violation(s), at the property, and a statement the city will "vacate, secure, remove, or demolish"[10] the property if action is not taken in a reasonable time.[11]

It is not mandatory that a property owner receive actual notice before demolition of the property,[12] provided that the city can establish that it has made a diligent effort to discover each mortgagee, lienholder, or owner before the public hearing proceeds. Alternatively, by filing notice of the public hearing in the Official Public Records of Real Property in the appropriate county, the notice requirements are met.[13]

Cities often physically post violation notices on the subject property as well. The physical posting of the notice on the subject property constitutes service.[14] Additionally, in emergency situations, courts have recognized that the protection of the health and safety of the public is a paramount governmental interest which takes precedence over notice and hearing requirements.[15] Such emergency demolitions are usually grounded in the city's police powers.

International Code Council: Along with the above requirements, cities have another mechanism to effectuate proper service. Texas has adopted codes promulgated by the International Code Council (ICC) as standard codes for cities. The ICC "I-Codes" are the most widely accepted, comprehensive set of model codes used in the United States. These "I-Codes" are found in state statutes but are adopted at the local level. Cities can make local amendments to a respective I- Code that better fits their purposes. The City of Galveston adopted the International Property Maintenance Code (IPMC) as a part of their 'dangerous and substandard buildings' ordinance. The IPMC provides notice requirements for code officials to follow when issuing violations against a property. The IPMC also establishes minimum requirements for the maintenance of existing buildings through model code regulations that contain clear and specific property maintenance and property improvement provisions.[16]

Substantive Due Process: Cities may satisfy procedural due process requirements but nevertheless continue to face substantive due process claims. "Substantive due process 'bars certain arbitrary wrongful government actions regardless of the fairness of the procedures used to implement them."[17] To succeed, the claimant must prove that a state actor unreasonably deprived them of their property. As stated previously, in order for a substantive due process claim to prevail, the claimant must show the city's actions were arbitrary or conscience shocking, in a constitutional sense.[18] Substantive due process claims therefore face a significant burden when a city employs well-crafted ordinances or laws governing demolition of a nuisance property.

Equal Protection: The Fourteenth Amendment's equal protection clause protects against violations by a "state actor" intentionally discriminating against a claimant because of membership in a protected class. There must be a showing that the claimant was "intentionally treated differently from others similarly situated, and moreover, that there is no rational basis for the difference in the treatment."[19] In my experience, it is difficult for a plaintiff to succeed in an equal protection claim regarding demolition of property by a city. Texas courts have held that under a rational basis analysis, as long as a classification is rationally related to a legitimate government objective, it will survive an equal protection challenge.[20] Abatement, which includes demolition of danger-

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Donna is the proud recipient of the 2017 Susan Rocha award for recognition of outstanding accomplishment in the field of municipal law and is a certified IMLA Fellow. She received her law degree from the University of Maryland School of Law and is licensed to practice in Maryland and Texas and in the U.S. District Court for Southern District of Texas. She is a Board Member on the 'National Adoption Day' organization in Galveston County, Texas, and continues to assist in the adoptions of children placed in adoptive families at minimal or no cost to the family. Donna is a proud mama of an Eagle Scout and she is very thankful to be a "Survivor Thriver." She continues to do her best to make a difference to others in her daily life and likes to bring humor and positivity to her work.

ous property by a city, is a legitimate government objective; a city's health and safety ordinance in accord with due process requirements will generally withstand challenge.

Likewise, a Fourth Amendment allegation of illegal search and seizure will have difficulty surviving court scrutiny if the evidence shows the city has complied with the due process procedures of its applicable health and safety ordinances.

Takings: The Fifth Circuit has been the site of numerous Takings claims in the context of demolition, which by its very nature is the destruction of a person's property. Courts recognize two types of takings: Regulatory Takings and Physical Takings. The Fifth Amendment "requires payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is a result of a condemnation proceeding or a physical appropriation."[21] An analysis of a physical takings claim relies upon whether the city breached its duty to justly compensate the property owner. Commonly known as eminent domain, Texas statutes outline the procedures by which municipalities may acquire private property for public purposes.[22] If the municipality takes private property without following the required procedures, the property owner is free to file an inverse condemnation proceeding against the municipality in state court. However, in a city demolition of dangerous property, the goal of the city is not to acquire property, but to abate a dangerous situation.

In a regulatory taking claim, a court must focus not only on whether the governmental entity failed to justly compensate a property owner after taking their property, but also on whether the regulation advances a substantial governmental interest and/or deprives the property owner of all economically valuable use of their land.[23] The test in a regulatory takings claim is whether the legislation at issue unreasonably interferes with a landowner's right to use and enjoy property. Clearly, it could be argued that the demolition of one's property is a physical taking; based upon the elements of the city regulation, demolition could also amount to a regulatory taking. However, a city's demolition of a dangerous and substandard structure is not an acquisition of the underlying land the property sits on. The city does not gain legal rights to the owner's fee simple or other ownership right to the land. The dangerous structure is removed, but all interests in the land remain with the owner.

In Texas, courts have held that if the property was in fact a nuisance, a takings analysis does not apply.[24] Instead, cities can lawfully rely on their police powers to demolish a structure. Through their police powers, municipalities have the ability to abate public nuisances: "regulation of nuisance properties is at the heart of the municipal police power. It is eminently reasonable for a city to prescribe minimum property maintenance standards to protect the public and to maintain adjacent land values."[25] This authority does not give a city carte blanche to do what it likes, when it likes: police powers are typically engaged based upon an emergent situation or circumstance, nevertheless a city may not arbitrarily enter abatement orders or declare the existence of nuisances with no underlying standards.[26] Cities may regulate property use in a way that assures the prevention and abatement of dangerous conditions so long as due process rights are honored.[27] Therefore, even in situations of emergency, it will benefit the city to provide post-demolition notice and due process remedies for its own protection and that of the owner.

Municipal Prosecution: City Of Galveston Housing Abatement Program – Why It Works.

The city of Galveston is a Home Rule municipality which operates under its own established City Charter. Home Rule cities derive their power from their state Constitution and look to their state legislature only as a limit on their authority, i.e. preemption. A simpler view is that a home rule municipality may do anything that is not specifically prohibited by its state law.

The city has been able to enforce its health and safety regulations more effectively in its municipal court of record through its *housing abatement program*. Distinguishing elements of the housing abatement program and its management are:

1. The housing abatement docket strictly handles properties that the city, according to applicable codes, has determined are substandard and dangerous such that demolition may be warranted;
2. The Assistant City Attorneys solely prosecute these cases in the municipal court;
3. The City Marshal's Code Enforcement personnel bring these properties to the Assistant City Attorneys for enforcement;
4. The cases are heard before a Judge who is a licensed attorney in the state;
5. All cases are heard in a public hearing;
6. All documents are filed in the municipal court of record, as well as in the real property records of Galveston County;
7. Original Petitions are published in the general local paper;
8. All documents are physically posted on the property along with the other notice requirements of mailings, etc.

Prior to the filing of any case in the municipal court of record, the attorney reviews each notice to make sure that the elements of the violations are met to classify a property as substandard and dangerous, as well as ensuring that proper notice has been made. The housing abatement process will then proceed.

Success: The housing abatement program has been extremely effective for the city. There has been increased compliance by owners who choose to repair their properties (and/or demolish them), which has decreased areas of blight. Development has increased, as well as the city's housing stock. While demolition itself is not always the goal in a housing abatement case, it can be a valuable tool. Storms will come and storms will go. The City of Galveston is still a work in progress; however, the decrease in substandard and dangerous properties has made substantial positive impacts on the city, creating a more vibrant, healthy and safe community. ML