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Due Process and Local Administrative Hearings Regulating Public Nuisances: Analysis and Reform.

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COMMENT

DUE PROCESS AND LOCAL ADMINISTRATIVE HEARINGS REGULATING PUBLIC NUISANCES: ANALYSIS AND REFORM

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I. INTRODUCTION

One of the most fundamental rights granted in the United States Constitution provides that an individual shall not be deprived by any state or government "of life, liberty, or property, without due process of law."[1] Due process is a cornerstone of American law, and although its meaning is not always clear, it requires that every person—regardless of race, wealth, national heritage, ethnicity, or other classification—be given notice and a meaningful opportunity to be heard.[2]

At issue in this Comment are due process rights required for hearings before Texas building and standards commissions. These hearings are adjudicated by quasi-judicial administrative boards that decide publicly-filed civil actions to abate public nuisances.[3] Specifically, the commissions decide whether to order repairs to abate a nuisance or, alternatively, whether to issue an order for

1. U.S. CONST. amend. XIV, § 1.

2. *See* Fuentes v. Shevin, 407 U.S. 67, 80 (1972) ("The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision[ ]making when it acts to deprive a person of his possessions."); *see also* U.S. CONST. amend. XIV, § 1 (outlining the rights guaranteed by the Fourteenth Amendment).

3. *See infra* Part II.C (discussing the general statutory authority for creating quasi-judicial commissions to regulate public nuisances). This Comment's scope does not include nuisance suits that are publicly-filed criminal actions, privately-filed civil actions, or petitions for injunctions. *See generally* Bryan M. Seiler, Note, *Moving from "Broken Windows" to Healthy Neighborhood Policy: Reforming Urban Nuisance Law in Public and Private Sectors*, 92 MINN. L. REV. 883, 893–94 (2008) (differentiating between publicly-filed criminal actions, publicly-filed civil actions, and privately-filed civil actions).

demolition of the property deemed a nuisance.[4] Reporters and affected citizens alike are often surprised to learn that many basic constitutional rights are not consistently recognized in commission hearings. For example, in a 2010 San Antonio, Texas report, a journalist observed a hearing and reported that witness testimony was not subject to cross-examination and that homes were demolished merely because of crime near the properties.[5] Making matters worse, the report described, with some concern, that once a commission orders a property to be demolished, the property owner must pay the demolition costs.[6]

This is not the first time reporters expressed shock when learning of the events that transpire at public nuisance hearings. Over a decade ago, a reporter in Dallas, Texas, described hearings before the now-defunct Urban Rehabilitation Standards Board (URSB)—the Dallas building and standards commission formerly in charge of regulating alleged public nuisances—to be "cheap theater," where individuals' rights were "overlooked and sometimes plain[ly] ignored."[7] At the hearing, a group of citizens sought to revitalize a church by transforming it into a youth ministry and community center, only to be rebuked by a URSB

4. *See* TEX. LOC. GOV'T CODE ANN. § 214.001(h) (West Supp. 2011) (permitting a city to "secure, . . . repair, remove, or demolish the building"); *see also infra* Part II.C (detailing the role of building and standards commissions).

5. Elaine Wolff, *Kangaroo Court (Part I): Meet the City's New Extra-Constitutional Crime-Fighting Tool*, SAN ANTONIO CURRENT, Apr. 21, 2010, http://sacurrent.com/printStory.asp?id=71078. An account from another jurisdiction has also reported that property was acted upon by local administrative commissions because of the onset of crime. *See* Bryan M. Seiler, Note, *Moving from "Broken Windows" to Healthy Neighborhood Policy: Reforming Urban Nuisance Law in Public and Private Sectors*, 92 MINN. L. REV. 883, 883–84 (2008) (describing a family that was almost evicted from their home because of public nuisance proceedings based on a neighbor's police call).

6. Elaine Wolff, *Kangaroo Court (Part I): Meet the City's New Extra-Constitutional Crime-Fighting Tool*, SAN ANTONIO CURRENT, Apr. 21, 2010, http://sacurrent.com/printStory.asp?id=71078; *see* LOC. GOV'T § 214.001(k) (providing the municipality's authority to secure a financial guarantee for the demolition of a substandard building worth more than $100,000); *id.* § 214.001(n) (authorizing a municipality to assess expenses and obtain a lien on property that is demolished, except protected homesteads).

7. Denise Mcvea, *Razing Hopes (Part I): Thousands of People in Dallas Need a Cheap Place to Live. So Why Is the City Destroying Homes that Could be Saved?*, DALL. OBSERVER, Nov. 2, 1995, http://www.dallasobserver.com/1995-11-02/news/razing-hopes-part-i/. The URSB was more recently the subject of a contested Texas Supreme Court case, in which its actions were ultimately overturned by a divided court. City of Dallas v. Stewart, 55 Tex. Sup. Ct. J. 271, 2012 WL 247966, at *1 (Jan. 27, 2012).

member who responded, without explanation, that she desired not to have another church in her neighborhood.[8]

There are also concerns that public nuisance proceedings are a method used by government actors to remedy societal problems by circumventing the higher burden of proof required in criminal actions.[9] Difficult decisions are made by building and standards commissions, especially when the decisions involve low-income persons who cannot afford to repair their property to meet statutory requirements.[10] For example, officials closed and subsequently demolished a homeless shelter in Temple, Texas, because the owners could not afford an asbestos survey, which is required before the completion of repairs to commercial structures.[11]

These reports underlie a commonplace reality that commission decisions can potentially have a severely detrimental effect upon people's lives. This Comment notes that the potential for loss placed on an individual is exacerbated by the absence of commonplace procedural due process rights in commission hearings.

Commission hearings are substantially different from typical judicial trials. The hearings are more aptly characterized as community meetings than court proceedings because various members of the public are allowed to make statements without following technical courtroom requirements.[12] The composition

8. *See id.* (reporting that in response to the citizens' pleas for an opportunity to renovate the church, one URSB member exclaimed, "I don't want any more churches in my neighborhood!").

9. *See* Bryan M. Seiler, Note, *Moving from "Broken Windows" to Healthy Neighborhood Policy: Reforming Urban Nuisance Law in Public and Private Sectors*, 92 MINN. L. REV. 883, 893–94, 904–05 (2008) (suggesting that public nuisance actions in civil court are perhaps the most common type of publicly-filed civil action due to the lower standard of proof in civil courts and because public nuisance actions are often fueled by a community's race-based agenda).

10. *See generally* Dan Fearson, *Martha's Kitchen Dorm, Store to Close*, TEMPLE DAILY TELEGRAM, June 2, 2009, at A1 (reporting about the closing of a homeless shelter's thrift shop, which would eventually lead to the close of the shelter, and recognizing that "several of the commission members seemed to get emotional when discussing their decisions").

11. *See id.* (reporting that the chairman of the homeless shelter said the survey would be too expensive, as it would potentially "cost 'hundreds of thousands' of dollars").

12. Texas law gives commission members the authority to set their own rules at hearings. TEX. LOC. GOV'T CODE ANN. § 54.034(b) (West 2008). Texas law does not

of the commissions and the staff present at meetings often reflect the hearings' community environment.[13] But commissions are typically composed of a cross section of city officials,[14] and hearings are sometimes initiated by complaints from citizens.[15]

otherwise require commissions that regulate public nuisances to administer an oath to witnesses before testifying or to require cross-examination of hostile witnesses. *See id.* § 54.034(b), (d) (stating only that commissions provide parties with the opportunity to present evidence and that commission members *may* administer an oath). The United States Supreme Court has similarly not required cross-examination or oath of witnesses in administrative hearings. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985) (determining that due process can be satisfied merely upon "notice and an opportunity to respond"). California has declined to require the administration of an oath and has also declined to require cross-examination of hostile witnesses on local administrative boards regulating public nuisances. *See* Mohilef v. Janovici, 58 Cal. Rptr. 2d 721, 733–41 (Ct. App. 1996) (declining to hold that a zoning board improperly denied cross-examination or failed to place witnesses under oath, as the court characterized the hearings as a community meeting with a "peer group ambience").

13. *See* CITY OF AUSTIN, TEX., BUILDING AND STANDARDS COMMISSION REGULAR MEETING MINUTES 1 (Sept. 22, 2010), *available at* http://www.ci.austin.tx.us/edims/document.cfm?id=144494 (describing the staff in attendance as "commission coordinator[s]," investigators, and a police officer); *see also* Elaine Wolff, *Kangaroo Court (Part I): Meet the City's New Extra-Constitutional Crime-Fighting Tool*, SAN ANTONIO CURRENT, Apr. 21, 2010, http://sacurrent.com/printStory.asp?id=71078 (portraying the cross sections of community groups represented on the board of the San Antonio Dangerous Structures Determinations Board (DSDB)).

14. *See Building and Standards Commission*, CITY OF HOUS., http://cbtcws.cityofhouston.gov/BoardsCommApplicationForm/BoardDesc.aspx?boardid=57 (last updated Aug. 16, 2011) (explaining the composition of the forty-member City of Houston Building and Standards Commission, and stating that the mayor appoints each member subject to city council confirmation); CITY OF AUSTIN, TEX., BUILDING AND STANDARDS COMMISSION REGULAR MEETING MINUTES 1 (Sept. 22, 2010), *available at* http://www.ci.austin.tx.us/edims/document.cfm?id=144494 (describing the staff in attendance as "commission coordinator[s]," investigators, and a police officer); Elaine Wolff, *Kangaroo Court (Part I): Meet the City's New Extra-Constitutional Crime-Fighting Tool*, SAN ANTONIO CURRENT, Apr. 21, 2010, http://sacurrent.com/printStory.asp?id=71078 (portraying the cross sections of community groups represented on the board of the San Antonio DSDB). In San Antonio, the DSDB consists of city employees from six departments: "fire, planning and development services, community initiatives, grants monitoring and administration, office of historic preservation, and public works." SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 6, art. VIII, § 6-158(a) (2008), *available at* http://library.municode.com/index.aspx?clientId=11508&stateId=43&stateName=Texas (follow "Chapter 6-Buildings" hyperlink; then follow "Article VIII-Dangerous Buildings and Distressed Property" hyperlink; then follow "Sec. 6-158" hyperlink).

15. In San Antonio, Texas, a group called the Dangerous Assessment Response Team (DART) initiates complaints for substandard properties and is responsive to citizen complains. *See* Elaine Wolff, *Kangaroo Court (Part I): Meet the City's New Extra-Constitutional Crime-Fighting Tool*, SAN ANTONIO CURRENT, Apr. 21, 2010, http://sacurrent.com/printStory.asp?id=71078 (announcing that one of DART's functions

Theoretically, commission decisions are based on utilitarian principles dedicated to supporting the community surrounding the property.[16] However, criticism has been drawn that commissions are an "extra-constitutional" way of fighting crime and redeveloping neighborhoods.[17]

Commissions are not composed of a group of elected persons, but of persons who are appointed by their respective local government.[18] There is no requirement that commission members have any type of legal background, and often persons appointed to these boards are not attorneys.[19] Moreover, because of the informal nature of these proceedings and the enormous power that commission members possess, legal mistakes are made that often result in severe ramifications for individual property owners.[20]

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will be targeting substandard properties "[t]hrough coordinate[d] and concentrated efforts"). Reports in Dallas from over a decade ago reveal that citizen-driven complaints were very common. *See* Denise Mcvea, *Demolition Man: How Lone Crusader Joe Burkleo Keeps the City's Wrecking Ball Swinging*, DALL. OBSERVER, Nov. 2, 1995, http://www.dallasobserver.com/1995-11-02/news/demolition-man/ (reporting how one citizen, who is not a city employee, filed perhaps thousands of complaints against properties all over the city); Denise Mcvea, *Razing Hopes (Part I): Thousands of People in Dallas Need a Cheap Place to Live. So Why Is the City Destroying Homes that Could be Saved?*, DALL. OBSERVER, Nov. 2, 1995, http://www.dallasobserver.com/1995-11-02/news/razing-hopes-part-i/ (describing the details of the complaint-driven process in Dallas, where a citizen can issue a complaint to the city's Code Enforcement department about the condition of the property).

16. *Cf.* Jeff L. Lewin, Boomer *and the American Law of Nuisance: Past, Present, and Future*, 54 ALB. L. REV. 189, 253–57 (1990) (describing how principles of utilitarianism are incorporated into the nuisance doctrines of both Edward Rabin and Richard Epstein).

17. *See generally* Elaine Wolff, *Kangaroo Court (Part I): Meet the City's New Extra-Constitutional Crime-Fighting Tool*, San Antonio Current, Apr. 21, 2010, http://www2.sacurrent.com/printStory.asp?id=71078 (criticizing decisions made by the DSDB).

18. TEX. LOC. GOV'T CODE ANN. § 54.033(a) (West 2008).

19. *See id.* (stipulating that commission members may be appointed by a local municipality but not requiring any particular, individualized qualification for commission members); *see also* Lewis v. Metro. Sav. & Loan Ass'n, 550 S.W.2d 11, 16 (Tex. 1977) (acknowledging that a hearing examiner who adjudicates administrative disputes may not necessarily have any kind of legal background).

20. *See* Denise Mcvea, *Razing Hopes (Part II): Thousands of People in Dallas Need a Cheap Place to Live. So Why Is the City Destroying Homes that Could be Saved?*, DALL. OBSERVER, Nov. 2, 1995, http://www.dallasobserver.com/1995-11-02/news/razing-hopes-part-ii/ (reporting numerous claims of inadequate notice given to property owners); Jim Schutze, *City vs. Citizen: One Man's Stand Against the Bureaucrats from Hell*, DALL. OBSERVER, Sept. 16, 2004, http://www.dallasobserver.com/2004-09-16/news/city-vs-citizen/ (reporting how the Dallas URSB failed to determine who had title to property involved in a demolition proceeding even upon repeated contacts with

This Comment analyzes the balance between an individual's due process rights and the interests of the state and local governments. One issue that will be examined is the firmly-held, common law right of states to abate buildings that are dangerous to the public or that do not meet minimum standards of fitness and habitability.[21] Most cities have some form of building and standards commission, and hearings can be quite frequent depending on the size and population of a jurisdiction.[22] Local governments have a valid and substantial interest in avoiding administrative backlogs and costly litigation fees resulting from appeals of commission orders.[23] The balancing of individuals' rights versus governmental interests often comes at the expense of one party; as more procedural due process rights are included in the process, it becomes more costly for the government.[24]

Additionally, this Comment seeks to answer the question of what constitutes sufficient procedural due process with regard to the government's abatement of public nuisances. In doing so, this Comment seeks to assist practitioners, property owners, local governments, and other interested parties associated with local administrative public nuisance hearings. The constitutional standard utilized when reviewing due process in an administrative

commission members); *see also* Bryan M. Seiler, Note, *Moving from "Broken Windows" to Healthy Neighborhood Policy: Reforming Urban Nuisance Law in Public and Private Sectors*, 92 MINN. L. REV. 883, 890 (2008) (arguing that local governments traditionally had broad discretion in exercising their respective police power to abate public nuisances).

21. *See infra* Part II.A (explaining legislative regulatory police power and its relation to abating public nuisances).

22. *See, e.g., Boards and Commissions*, CITY OF COPPELL, TEX., http://www.ci.coppell.tx.us/boards-and-commissions (last visited Oct. 6, 2011) (showing that the city's Building and Standards Commission is a subsection of the Board of Adjustment); CITY OF WACO, TEX., BUILDING STANDARDS COMMISSION MEETING MINUTES (May 5, 2010), *available at* http://www.waco-texas.com/pdf/agendas/Building%20Standards/05-04-11%20Minutes.pdf (conducting hearings on twenty-eight properties); CITY OF TEXARKANA, TEX., BUILDING AND STANDARDS COMMISSION MEETING MINUTES (Apr. 21, 2008), *available at* http://www.ci.texarkana.tx.us/departments/bscommission/minutes/20101102.pdf (ordering demolition of thirty-one structures).

23. *Cf.* Mathews v. Eldridge, 424 U.S. 319, 348 (1976) (considering the importance of burdens and costs imposed on a government's social security benefits administrative system when the number of hearings increases).

24. *See id.* ("At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost.").

proceeding involves a balancing of interests.[25] This Comment examines individual rights associated with due process and balances those interests with appointment of counsel, notice, judicial review, cross-examination, record-keeping of decisions, remediation, a neutral decision maker, and judicial relief from a wrongful order.[26] Lastly, this Comment seeks to establish pragmatic statutory amendments that act as a proposed compromise between an individual's constitutional due process rights and the government's interests.

II. LEGAL BACKGROUND

A. *Legal Standards for Abating Public Nuisances*

Under the Texas Constitution, the government is not required to compensate property owners when the property is deemed a public nuisance, as it otherwise must do when taking private property for a public purpose.[27] For property to be deemed a public nuisance at the state level, the property must be:

> (1) dilapidated, substandard, or unfit for human habitation and a hazard to the public health, safety, and welfare;
> (2) regardless of its structural condition, unoccupied by its owners, lessees, or other invitees and is unsecured from unauthorized entry to the extent that it could be entered or used by vagrants or other uninvited persons as a place of harborage or could be entered or used by children; or
> (3) boarded up, fenced, or otherwise secured in any manner if:
> (A) the building constitutes a danger to the public even though secured from entry; or
> (B) the means used to secure the building are inadequate to prevent unauthorized entry or use of the building in the manner described by [s]ubdivision (2).[28]

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25. *See infra* Part III.A (describing the balancing approach taken by the United States Supreme Court when deciding due process issues in an administrative hearing).

26. *See infra* Part IV (examining traditional due process rights as they apply to nuisance proceedings).

27. *See* TEX. CONST. art. I, § 17(a)(2) (proclaiming that property shall not be taken without adequate compensation unless the "destruction is for . . . the elimination of urban blight on a particular parcel of property").

28. TEX. LOC. GOV'T CODE ANN. § 214.001(a) (West Supp. 2011); *see* City of Dallas v. Stewart, 55 Tex. Sup. Ct. J. 271, 2012 WL 247966, at *5 (Jan. 27, 2012)

Similarly, courts define a nuisance as "a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities."[29] The principal difference between the two standards is that in the statutory definition, the condition deemed a nuisance creates a public interference and a local government has discretionary authority to bring a civil claim based on this interference.[30] State law requires local ordinances to set minimum standards for buildings, to provide a method for giving notice, and to give property owners a hearing to determine whether their property complies with local standards.[31]

The authority to abate a public nuisance is derived from a state or local government's regulatory police power.[32] In accordance with this authority, local ordinances must satisfy two separate standards: (1) public interest must require these ordinances; and (2) the means to meet the ordinance requirements must be "reasonably necessary" and not "unduly oppressive" on any person.[33] Once a designated commission or municipality decides

(identifying Texas Local Government Code section 214.001(a) as the state's statutory framework for defining public nuisances).

29. Schneider Nat'l Carriers, Inc. v. Bates, 147 S.W.3d 264, 269 (Tex. 2004); *see* Jamail v. Stoneledge Condo. Owners Ass'n, 970 S.W.2d 673, 676 (Tex. App.—Austin 1998, no pet.) (defining a nuisance as "an unreasonable interference with a right common to the general public," with reasonableness further defined by a number of factors).

30. *See* LOC. GOV'T § 214.001(p) (providing that a local government may hold a hearing regulating public nuisances in a "civil municipal court"). For the municipality to hold a hearing, it must provide notice by having an ordinance in place that defines a nuisance, explains the consequences of a nuisance, and requires sending a notice of hearing to the owner, lienholder, or mortgagee. *Id.* § 214.001(a)–(c).

31. *Id.* § 214.001(b).

32. *See* Lawton v. Steele, 152 U.S. 133, 136 (1894) (stating that the extent and limits of a state's police power are "universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance"); *Stewart*, 2012 WL 247966, at *10 (affirming that the power to abate public nuisances derives from a local government's police power); Stockwell v. State, 110 Tex. 550, 221 S.W. 932, 934 (1920) (declaring that the state may dictate something to be a nuisance through its regulatory police power); Como v. City of Beaumont, 345 S.W.3d 786, 791–92 (Tex. App.—Beaumont 2011, pet. filed) (affirming that a city can use its police power to regulate public nuisances through the enactment of ordinances); Satterfield v. Crown Cork & Seal Co., Inc., 268 S.W.3d 190, 214 (Tex. App.—Austin 2008, no pet.) (requiring, generally, that a statute derived under a state's police power be "related to safeguarding the public's health, safety or welfare").

33. *Lawton*, 152 U.S. at 137; Traylor v. City of Amarillo, Tex., 492 F.2d 1156, 1159

that a property is a public nuisance, it may issue an order for remediation or repair, order occupants to vacate the premises, or demolish the property completely.[34] If a hearing is held and an order for demolition or remediation of the nuisance is made, the property owner or other affected party typically has thirty days to comply with the order.[35] If the property owner does not comply, the local government may seek an order to demolish the property and secure payment for the demolition by obtaining a lien against the property.[36] Conversely, a local government must not ordinarily provide the owner more than ninety days to comply with the order.[37] However, after the time period provided by an order elapses, courts generally defer to local governments regarding how long to wait before proceeding with demolition, especially when intervening factors cause a delay.[38] It is consistent with proper nuisance abatement procedures to padlock

(5th Cir. 1974) (quoting Goldblatt v. Town of Hempstead, 369 U.S. 590, 594–95 (1962)).

34. *See* LOC. GOV'T § 214.001(d) ("After the public hearing, if a building is found in violation of standards set out in the ordinance, the municipality may order that the building be vacated, secured, repaired, removed, or demolished by the owner within a reasonable time as provided by this section."). The authority for municipalities to abate public nuisances existed at common law and has been recognized in courts formerly exercising equitable authority. *See, e.g.*, Kalbfell v. City of St. Louis, 211 S.W.2d 911, 917 (Mo. 1948) (holding that a city has ample authority to abate nuisances of commercial property and to accordingly "regulate the construction and materials of buildings and structures, inspect the same, and when necessary prevent the use thereof and require alterations to make them safe"); City of Nashville v. Weakley, 95 S.W.2d 37, 38 (Tenn. 1936) (holding that a city council "may declare, by ordinance, what constitutes nuisances, and provide for the abatement of the same, and make all repairs and improvements necessary for the health and convenience of the inhabitants" and that cities have a "common[]law right" to abate a nuisance regardless of a specific statute (internal quotation marks omitted)).

35. LOC. GOV'T § 214.001(h).

36. *Id.* § 54.036 (West 2008); *see id.* § 214.001(h), (m)–(n) (West Supp. 2011) (outlining the procedures a municipality must follow when demolishing a building).

37. *Id.* § 214.001(j), (m). The statute states that the amount of time provided for compliance is thirty days. *Id.* § 214.001(h). If the property owner needs more than thirty days to comply, she must establish why more time is needed, and the municipality must create a schedule for performance of the task. *Id.* § 214.001(h)(2), (i). *But see* Barua v. Cnty. of Dallas, 100 S.W.3d 629, 637 (Tex. App.—Texarkana 2003, pet. denied) (indicating that the city waited over 120 days from the expiration of the final restraining order before demolishing the property).

38. *See Barua*, 100 S.W.3d at 635, 637 (denying the property owner's claims of waiver and laches after the city was judicially delayed over two years from its initial order to demolish the property).

the property during this time, so long as the property owner is provided a means to access the property.[39]

B. *Validity of Ordinances*

Reviewing courts show considerable deference to the validity of ordinances and statutes that regulate public nuisances.[40] When interpreting an ordinance, much like interpreting a statute, courts will generally adhere to the intentions of local legislators.[41] City ordinances are constitutional so long as they provide for adequate procedural due process, are "reasonable," and "otherwise accord procedural fairness."[42] Thus, at a minimum, an ordinance must provide for notice and an opportunity to be heard.[43]

However, the deference shown by reviewing courts is balanced by the constitutional requirement that an ordinance regulating a public nuisance must be sufficiently clear to avoid a constitutional

39. The Stone Fox v. State, 668 S.W.2d 911, 913 (Tex. App.—Houston [14th Dist.] 1984, no writ).

40. *See* Como v. City of Beaumont, 345 S.W.3d 786, 792 (Tex. App.—Beaumont 2011, pet. filed) (upholding the city's action to abate public nuisance through ordinances while providing property owner with de novo judicial review); Carlson v. City of Houston, 309 S.W.3d 579, 587–88 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (harmonizing both the city's building code and the International Building Code when arguments were made that the statutes were in conflict). The legal framework in Texas for defining public nuisances is currently valid law, and many cities now simply adopt this framework into their own respective codes. *See* LOC. GOV'T § 214.001(a); City of Dallas v. Stewart, 55 Tex. Sup. Ct. J. 271, 2012 WL 247966, at *13 (Jan. 27, 2012) (Johnson, J., dissenting) (noting that the Texas framework for defining public nuisances is "detailed and comprehensive" and that the City of Dallas did not act erroneously in adopting this framework verbatim).

41. J.B. Adver., Inc. v. Sign Bd. of Appeals, 883 S.W.2d 443, 447 (Tex. App.—Eastland 1994, writ denied); *accord* Lee v. City of Houston, 807 S.W.2d 290, 293–95 (Tex. 1991) (interpreting an ordinance to hold that the pertinent sections "indicate that the legislature intended the Act to have broader application than the court of appeals suggests," and thus declining to "add words that are not implicitly contained in the language of the statute"); State v. Spartan's Indus., Inc., 447 S.W.2d 407, 414 (Tex. 1969) (upholding Sunday closing laws as they have a "long precedent" of constitutionality, and stating "[i]t is not the function of the courts to judge the wisdom of a legislative enactment").

42. Traylor v. City of Amarillo, Tex., 492 F.2d 1156, 1159 (5th Cir. 1974).

43. *See* Fuentes v. Shevin, 407 U.S. 67, 80, 96 (1972) (holding a law for replevin unconstitutional because it deprived persons of property when it denied the opportunity to be heard); *accord* Cedar Crest No. 10, Inc. v. City of Dallas, 754 S.W.2d 351, 352 (Tex. App.—Eastland 1988, writ denied) (holding that a city ordinance that outlines a process for giving notice and allows persons affected by a demolition order to appeal complies with procedural due process).

challenge for vagueness.[44] In accordance with this requirement, there must be "reasonable certainty" inherent in the language of an ordinance so that "persons of common intelligence are [not] compelled to guess at a law's meaning and applicability."[45] A claim that a statute or ordinance is invalid based on vagueness will be weakened if other procedural safeguards, such as adequate and detailed notice of defects, are sufficiently provided.[46] Also, even though an ordinance regulating a public nuisance may contain only "[g]eneral descriptive words," such words are sufficient only if their provision is "practically unavoidable in view of the difficulty of anticipating every condition that might make a building liable to the remedies of repair or demolition."[47] Thus, while deferring to a lawmaking body's intentions, these intentions must be stated clearly and specifically enough to allow property owners to understand the statutory requirements.

C. *Statutory Authority for the Creation of Quasi-Judicial Commissions*

Texas law provides that ordinances enforceable by quasi-judicial commissions are those that "relat[e] to dangerously damaged or deteriorated buildings or improvements" or that relate to a "building code or to the condition, use, or appearance of property in a municipality."[48] In essence, a quasi-judicial body possesses the authority to determine factual matters in accordance with acts passed by the legislature.[49] Following this principle, although a

44. *See generally* City of Chicago v. Morales, 527 U.S. 41, 52 (1999) (holding that an ordinance is unconstitutional based on vagueness "because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests").

45. *J.B. Adver.*, 883 S.W.2d at 448. Modern rulings in other jurisdictions express deference toward the clarity of local ordinances and refuse to question their vagueness absent a sufficient showing to the contrary. *See, e.g.*, Jensen v. Cnty. of Sonoma, No. C-08-3440 JCS, 2010 WL 2330384, at *17 (N.D. Cal. June 4, 2010) (granting summary judgment against the plaintiff's claim of vagueness).

46. *Traylor*, 492 F.2d at 1160.

47. *Id.* at 1159.

48. TEX. LOC. GOV'T CODE ANN. § 54.032(3), (5) (West 2008).

49. *Id.* § 54.033(a); Mo., K. & T. Ry. Co. of Tex. v. Shannon, 100 Tex. 379, 100 S.W. 138, 141 (1907); *see also* Trimmier v. Carlton, 116 Tex. 572, 296 S.W. 1070, 1080 (1927) (holding that "the power to find facts" regarding the applicability of a certain law can be delegated by the legislature if it relates to matters of local concern); Tellez v. City of Socorro, 296 S.W.3d 645, 648 (Tex. App.—El Paso 2009, pet. denied) (affirming that a

city council or other municipal rulemaking authority may establish specific requirements for defining a nuisance, the ultimate determination of whether property is in fact a nuisance may be delegated to a quasi-judicial commission.[50] Although a city council may pass an ordinance regulating public nuisances, it is not the final authority to determine whether each specific structure in question qualifies as a public nuisance.[51] Thus, if an ordinance grants a municipal body this authority, it is void.[52]

Quasi-judicial commissions that enforce public nuisance ordinances are appointed by the governing body of a municipality and must consist of at least five persons.[53] The rules for hearings before quasi-judicial commissions are adopted by a majority of the commission members.[54] These rules must provide an opportunity for parties appearing before the commission to offer evidence and to present their own testimony.[55]

D. *Different Controlling Precedents*

A line of Texas precedent, stemming from *Crossman v. City of Galveston*[56] and *Stockwell v. State*,[57] differentiates between various adjudication processes used to abate public nuisances.[58]

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board of adjustment can properly be classified as a quasi-judicial body). Although the Texas Supreme Court has recently held that a building and standards commission regulating public nuisances is not afforded any deference when deciding that property is a nuisance, a commission may still make determinations of "historical facts" in conjunction with nuisance determinations. City of Dallas v. Stewart, 55 Tex. Sup. Ct. J. 271, 2012 WL 247966, at *11 (Jan. 27, 2012).

50. *See* LOC. GOV'T § 54.033(a) ("The governing body of the municipality may provide for the appointment of a building and standards commission to hear and determine cases concerning alleged violations of ordinances.").

51. *See* City of Texarkana v. Reagan, 112 Tex. 317, 247 S.W. 816, 817 (1923) ("[T]he question as to whether or not the building here involved was a nuisance was a justiciable question, determinable alone by the court or jury trying the case.").

52. *See id.* (holding that an ordinance is void if it makes the city council's determination final on whether property is a nuisance).

53. LOC. GOV'T § 54.033(a)–(b).

54. *Id.* § 54.034(b).

55. *Id.*

56. Crossman v. City of Galveston, 112 Tex. 303, 247 S.W. 810 (1923).

57. Stockwell v. State, 110 Tex. 550, 221 S.W. 932 (1920).

58. *Stockwell* stands for the proposition that a state can only declare property a public nuisance if the property is a "nuisance in fact." *Id.* at 934–35. On the other hand, *Crossman* provides that only courts may determine whether property is a nuisance when it is not a nuisance at common law or a nuisance per se. *Crossman*, 247 S.W. at 812.

These cases held that different procedures may be used depending on whether the public nuisance is deemed an emergency or a "nuisance in fact."[59] In Texas, a nuisance in fact is defined as property that "endangers the public health, public safety, [or] public welfare, or offends the public morals."[60] A judicial determination is required to decide whether a person's property is "in fact" a public nuisance.[61] Subsequent decisions have held that property owners are entitled to have this determination made by the courts rather than a mere administrative ruling.[62]

The Fifth Circuit, however, described these cases as "old" and "troubling," and it distinguished them on federal due process requirements.[63] These cases may also be distinguished because at the time they were decided, the state statutory framework describing a public nuisance did not yet exist, nor was judicial review provided for by statute.[64] Indeed, *Crossman* and *Stockwell* were decided at a time when local governments denied many due process rights completely, including the right to judicial review of a local government's nuisance determination.[65] Accordingly,

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59. *Id.* at 814.

60. State v. Spartan's Indus., Inc., 447 S.W.2d 407, 413 (Tex. 1969).

61. *Crossman*, 247 S.W. at 813; *Stockwell*, 221 S.W. at 935.

62. *See e.g.*, City of Houston v. Lurie, 148 Tex. 391, 224 S.W.2d 871, 875 (1949) (referencing *Crossman* and holding that the authority to abate a nuisance requires some kind of "judicial discretion, and ordinarily includes the authority to weigh evidence, to make findings of fact, and to apply rules of law").

63. Traylor v. City of Amarillo, Tex., 492 F.2d 1156, 1158 (5th Cir. 1974).

64. *See* City of Dallas v. Stewart, 55 Tex. Sup. Ct. J. 271, 2012 WL 247966, at *16–17 (Jan. 27, 2012) (Johnson, J., dissenting) (arguing that at the time *Crossman*, *Stockwell*, and their progeny were decided, "there was no statute or ordinance providing for judicial review"); *see also* TEX. LOC. GOV'T CODE ANN. § 214.001(a) (West Supp. 2011) (authorizing abatement for any building which is "dilapidated, substandard, or unfit for human habitation"); *Lurie*, 224 S.W.2d at 876 (arguing that the court may be more inclined to adopt a particular standard of review if it were "in the statutes, including the home rule enabling act, . . . the city's charter or in the city's ordinance, expressing an intention that the suit be tried under that rule").

65. *See, e.g.*, *Lurie*, 224 S.W.2d at 874 (affirming the trial court's nuisance finding when there is no form of review statutorily provided); City of Texarkana v. Reagan, 112 Tex. 317, 247 S.W. 816, 817 (1923) (expressing disapproval of the finality of an ordinance that allowed the city council to make a nuisance determination and then summarily abate the property without any opportunity for appeal); *Crossman*, 247 S.W. at 812 (holding that an ordinance is invalid when it gives a local government the authority to abate *all* dilapidated buildings even if said buildings do not "injure, hurt, or harm [anyone]"); *Stockwell*, 221 S.W. at 934 (indicating that the terms of the statute authorize the

federal courts have not enforced the mandate of *Crossman* and *Stockwell*, which requires a judicial determination in certain public nuisance cases.[66]

In a highly contested five-to-four decision, the Texas Supreme Court, in *City of Dallas v. Stewart*,[67] brought *Crossman* and *Stockwell* back from over fifty years of discredit, and ruled that Texas law requires a judicial determination for a building to be deemed a nuisance in fact.[68] It is worth noting that an attorney who challenges a commission determination on due process grounds now has a distinct advantage when making the challenge in Texas court versus federal court, because there will be a *higher* due process standard in the state court.[69] As the Fifth Circuit concluded, "Whatever the status of these decisions as statements of the law of Texas, we do not believe such a requirement is imposed by the federal constitutional guarantee of due process."[70]

III. CONSTITUTIONAL DUE PROCESS STANDARD

A. *General Constitutional Adjudication*

The United States Supreme Court has ruled that "[a]ny significant taking of property by the [s]tate is within the purview of the [federal] Due Process Clause."[71] The extent to which due process rights are required in administrative proceedings is

commissioner of agriculture to abate nuisances but allow no appeal beyond the commissioner's decision).

66. *See Traylor*, 492 F.2d at 1159 n.4 (declaring that the court would not decide whether the *Stockwell* or *Crossman* decisions were valid and that even if the cases required a judicial determination of public nuisance law, the requirement is not "cognizable under the Fourteenth Amendment's [D]ue [P]rocess [C]lause").

67. City of Dallas v. Stewart, 55 Tex. Sup. Ct. J. 271, 2012 WL 247966 (Jan. 27, 2012).

68. *Id.* at *1, *5–7. Prior to *Stewart*, Texas courts declined to address the issue of whether administrative commissions regulating public nuisances were improper under *Crossman* and its progeny, instead citing these cases for other reasons. *See* LJD Props., Inc. v. City of Greenville, 753 S.W.2d 204, 207 (Tex. App.—Dallas 1988, writ denied) (noting that the "message to be gleaned from *Crossman* and its progeny" was that the legislative police power cannot be invoked improperly).

69. *Compare Traylor*, 492 F.2d at 1158 ("[W]e do not believe that the United States Constitution requires that a judicial determination precede demolition of property found to be a nuisance."), *with Stewart*, 2012 WL 247966, at *9–10 (determining that under the Texas Constitution, agency decisions to demolish an individual's property should be afforded de novo judicial review).

70. *Traylor*, 492 F.2d at 1158.

71. Fuentes v. Shevin, 407 U.S. 67, 86 (1972).

determined by a balancing approach, first enunciated by the Court in *Mathews v. Eldridge*.[72] The *Eldridge* standard balances three factors: (1) the extent that private interests are affected in the proceeding; (2) the risk of wrongfully depriving a party of its interest under the current procedures along with the utility of additional procedures that could lessen this risk; and (3) the government's interest at stake, such as the administrative and financial burdens imposed upon a public actor if additional procedures are incorporated.[73] Essentially, this approach balances the gravity of an individual's potential loss against the government's interests, both fiscally and otherwise.[74] California has added an additional factor to the *Eldridge* balancing test.[75] This factor was originally derived from *People v. Ramirez*,[76] and it considers the "dignitary interest in informing individuals of the nature, grounds[,] and consequences of the action and in enabling them to present their side of the story before a responsible government official."[77]

While the United States Supreme Court acknowledges that adjudication of due process challenges is an "uncertain enterprise," the essence of this enterprise involves the consideration of a particular situation and a determination of whether it comports with "fundamental fairness."[78] The meaning of fundamental fairness changes in any given situation, and the appropriate due process measures required in each case will

72. Mathews v. Eldridge, 424 U.S. 319 (1976).

73. *Id.* at 334–35; Univ. of Tex. Med. Sch. at Hous. v. Than, 901 S.W.2d 926, 930 (Tex. 1995) (citing *Eldridge*, 424 U.S. at 335); City of Arlington v. Centerfolds, Inc., 232 S.W.3d 238, 250 (Tex. App.—Fort Worth 2007, pet. denied) (citing *Eldridge*, 424 U.S. at 335). Some commentators argue *Eldridge* is often misapplied and should be used to determine what kind of hearing is required, rather than used to determine whether a hearing is required at all. Bernard Schwartz, *A Decade of Administrative Law: 1987–1996*, 32 TULSA L.J. 493, 522 (1997).

74. *See* Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970) (describing the balancing approach as the "extent to which [an individual] may be condemned to suffer grievous loss" weighed against the government's interest in the present form of an administrative adjudication (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) (internal quotation marks omitted))).

75. *See* People v. Ramirez, 599 P.2d 622, 628 (Cal. 1979) (assessing due process based on four factors rather than three).

76. People v. Ramirez, 599 P.2d 622 (Cal. 1979).

77. *Id.* at 628.

78. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 24–25 (1981).

depend on the nature of each case.[79] Thus, reviewing courts are free to customize the *Eldridge* balancing approach to conform to fundamental fairness based on the pertinent facts of the case.[80]

B. *The First* Eldridge *Factor: Affected Private Interests*

The degree to which an individual's private interests are afforded greater due process protection depends on the utility of the individual's property.[81] For example, government-provided welfare is extremely valuable to its recipients because it is often the only means by which the recipients subsist.[82] Therefore, one consideration under this factor is the extent the individual's loss can otherwise be corrected.[83]

In a case involving an eviction proceeding from publicly-subsidized apartment housing, the Fourth Circuit asserted that a wrongful administrative determination "cannot be speedily made right because of the demand for low-cost public housing and the likelihood that the space from which he was evicted will be occupied by others."[84] Similarly, Judge Dennis from the Fifth Circuit argued for increased caution when reviewing decisions in urban nuisance cases because "destroyed property cannot be restored and the best evidence of whether the seizure was justified will have been demolished."[85]

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79. Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (quoting Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985)).

80. *But see* Goldberg v. Kelly, 397 U.S. 254, 276 (1970) (Black, J., dissenting) (criticizing the balancing approach because it gives too much deference to reviewing courts, which may result in decisions based on what the court believes is a "fair and humane procedure" and not based on legal grounds).

81. *Compare* Mathews v. Eldridge, 424 U.S. 319, 342–43 (1976) (arguing that termination of unemployment benefits is not as substantial as that of welfare benefits), *with Goldberg*, 397 U.S. at 264 (portraying the loss of welfare rights as an especially grievous loss, because welfare benefits often provide a sole means of livelihood to their recipients).

82. *Goldberg*, 397 U.S. at 264.

83. *See id.* (emphasizing that once a welfare recipient's benefits are taken away, his desperate situation forces him to seek daily subsistence rather than seeking a remedy through the welfare or court systems); Caulder v. Durham Hous. Auth., 433 F.2d 998, 1003 (4th Cir. 1970) (recognizing the difficulties faced when trying to remedy an improper eviction).

84. *Caulder*, 433 F.2d at 1003.

85. Freeman v. City of Dallas, 242 F.3d 642, 667 (5th Cir. 2001) (Dennis, J., dissenting).

Real property ownership is likely to have substantial value to an individual under the first *Eldridge* factor.[86] In *Connecticut v. Doehr*,[87] the Supreme Court described attachment interests on property to be "significant" in regards to how they affect private interests under *Eldridge* because attachments can result in great economic hardship to a property owner.[88] In *Doehr*, the Court agreed with the government that attachments "do not amount to a complete, physical, or permanent deprivation of real property," but declared that due process concerns may still exist.[89] Similar treatment of real property interests is found in *United States v. James Daniel Good Real Property*,[90] where the Court required the government give notice prior to taking real property in a civil commitment proceeding.[91] Justice Kennedy noted that the property owner possessed "valuable rights of ownership, including the right of sale, the right of occupancy, the right of unrestricted use and enjoyment, and the right to receive rents."[92] Notably, the subject property in *James Daniel* was used as rental property and was involved in connection with the seizure of contraband following the property owner's arrest.[93]

The remarks in these opinions provide an accurate reflection of how the deprivation of real property interests could be treated with regard to due process considerations. Courts are likely to conclude that the demolition of one's property is a substantial private interest under the first *Eldridge* factor and, thus, determine that it warrants substantial protection for due process purposes.

In *Stewart*, the Texas Supreme Court did precisely this,

86. *See* United States v. James Daniel Good Real Prop., 510 U.S. 43, 53–54 (1993) ("[An individual]'s right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance."); *cf. Eldridge*, 424 U.S. at 333 (asserting that an individual must be provided procedural due process before being deprived of his property interest because it would be a "grievous loss" (internal quotation marks omitted)).

87. Connecticut v. Doehr, 501 U.S. 1 (1991).

88. *Id.* at 11; *accord* Woll v. Cnty. of Lake, 582 F. Supp. 2d 1225, 1229 (N.D. Cal. 2008) (providing that a jury could find that a prehearing attachment caused the property owner "substantial harm").

89. *Doehr*, 501 U.S. at 12.

90. United States v. James Daniel Good Real Prop., 510 U.S. 43 (1993).

91. *Id.* at 62.

92. *Id.* at 54.

93. *Id.* at 47–48.

concluding that an individual's ownership of real property should be afforded great weight in due process challenges.[94] The *Stewart* court remarked: "Our opinion emphasizes the importance of an individual property owner's rights when aligned against an agency appointed by a [c]ity to represent the [c]ity's interests."[95]

C. *The Second* Eldridge *Factor: Risk of Wrongful Deprivation*

The second *Eldridge* factor examines the rules applied to the administrative process and evaluates whether these rules carry inherent risks of producing an incorrect determination.[96] *Eldridge* considered administrative process risks, including the reversal rate, the accessibility of information the government utilizes, and the ease with which an individual can present his testimony or make his argument.[97] One strict procedural requirement associated with certain administrative proceedings is that any summary denial of a governmental benefit is not allowed without a hearing.[98] Also, ex parte investigations are suspect, especially when the individual is "given neither a contemporaneous nor an after-the-fact opportunity to respond."[99]

The reversal rate of building and standards commissions is difficult to ascertain because the decisions are based on subjective, general standards that depend on the values of the community where the property is located and on the rules of each individual commission.[100] Furthermore, an individual's access to information that a local building and standards commission utilizes

94. *See* City of Dallas v. Stewart, 55 Tex. Sup. Ct. J. 271, 2012 WL 247966, at *9–10 (Jan. 27, 2012) (emphasizing "the importance of an individual property owner's rights when aligned against an agency" representing a city's interest, and concluding that the importance of this right must be considered when "determining what procedure is due").

95. *Id.* at *9.

96. Mathews v. Eldridge, 424 U.S. 319, 335, 343–44 (1976).

97. *Id.* at 345–47.

98. *See* Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (requiring a pretermination hearing before eliminating welfare benefits); Yee-Litt v. Richardson, 353 F. Supp. 996, 1000–01 (N.D. Cal.) (striking down a state law that provided summary termination of benefits prior to an administrative hearing when the proceeding differentiated between factual and policy questions), *aff'd sub nom.* Carleson v. Yee-Litt, 412 U.S. 924 (1973).

99. Univ. of Tex. Med. Sch. at Hous. v. Than, 901 S.W.2d 926, 932 (Tex. 1995).

100. *Cf.* Jamestown Partners, L.P. v. City of Fort Worth, 83 S.W.3d 376, 385 (Tex. App.—Fort Worth 2002, pet. denied) (noting that local governments are given deference with regard to the timelines and standards they set for demolitions of buildings deemed to be nuisances).

may be quite limited.[101] When making a ruling, commissions may rely on opinions from personnel, including building inspectors, investigators, and legal counsel, but these opinions are not always provided at a hearing.[102] The degree to which an individual has access to information largely depends on the length and specificity of the building inspector's report because commissions may be more inclined to follow the recommendations of building inspectors than of any other staff member.[103] Not only does a thorough and specific report provide access to the information used by a commission, it also enables an individual to present a more compelling challenge to specific charges against his property, thereby increasing conformity with the second *Eldridge* factor.[104]

Flexibility in the rulemaking process also increases the likelihood that commission decisions will not be overturned.[105] Rulings based on expedited summary hearings that offer scant evidence of their respective decisions are suspect.[106] Each commission is ultimately in control of its own rules.[107] Crucial due process components in light of the second *Eldridge* factor include affording property owners multiple opportunities to confront the issues charged against them for the condition of their

101. *See* Veeck v. S. Bldg. Code Cong. Int'l, Inc., 241 F.3d 398, 403 (5th Cir. 2001) (holding a set of building codes valid even though they were drafted by a private entity and not made part of the public record), *aff'd*, 293 F.3d 791 (5th Cir. 2002) (en banc).

102. *See* CITY OF WACO, TEX., BUILDING STANDARDS COMMISSION MEETING MINUTES paras. C–D (May 5, 2010), *available at* http://www.waco-texas.com/pdf/agendas/Building%20Standards/05-04-11%20Minutes.pdf (accepting staff recommendations without specifying what exactly these opinions were and why they were made).

103. *See, e.g.*, CITY OF MCKINNEY, TEX., BUILDING AND STANDARDS COMMISSION MEETING MINUTES 1–3 (Feb. 11, 2008), *available at* http://www.mckinneytexas.org/agendas/councilmeetings/031808/ (follow "3 Consent Agenda" hyperlink; then follow "3-1 Minutes" hyperlink; then follow "8-124 BSC 2-11-08 Minutes.doc" hyperlink to download document) (providing a building inspector report for a majority of the properties considered).

104. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (emphasizing the second factor as a consideration of what risks may result with current procedures in use and the value of using additional safeguards to protect against an erroneous deprivation).

105. Freeman v. City of Dallas, 242 F.3d 642, 653 (5th Cir. 2001) (noting that rules giving a property owner the chance to appear before a commission more than once and providing flexible remedies are more likely to survive a due process challenge).

106. *See id.* at 653–54 (holding that regulatory enforcement measures of the city are not arbitrary because they consist of published standards and flexible remedies).

107. TEX. LOC. GOV'T CODE ANN. § 54.034(b) (West 2008).

properties and providing property owners with the opportunity to present their case.[108]

The Texas Supreme Court rejected the idea that quasi-judicial commissions, in accordance with the state legislative scheme, are competent to make public nuisance determinations.[109] Labeling nuisance determinations a "matter of constitutional right," the court remarked that "a panel of citizens untrained in constitutional law" is not properly qualified to make a determination without de novo judicial review.[110] Administrative agencies, such as the quasi-judicial commissions commonly used to regulate public nuisances, "occupy a subordinate status in our system of government."[111] The court held that only determinations of "historical fact," such as whether a building is a fire hazard, should be afforded deference.[112] In contrast, administrative determinations of whether a building is properly determined to be a nuisance under state and local standards should not be afforded deference.[113]

While not expressly overturning the statutory provisions authorizing quasi-judicial commissions to make public nuisance determinations, the Texas Supreme Court made it clear that it disapproves of persons not required to have any legal background making these determinations.[114] The legislature's enactment of rules allowing persons with no legal background to make legal

108. *See Freeman*, 242 F.3d at 648 n.8, 653 (citing prior cases that analyzed nuisance determinations through substantive due process, and referencing significant safeguards when upholding a Dallas ordinance including multiple hearing possibilities, reasonable time limits, flexible remedies, and the grant of judicial review).

109. City of Dallas v. Stewart, 55 Tex. Sup. Ct. J. 271, 2012 WL 247966, at *9–10 (Jan. 27, 2012) (emphasizing that a nuisance claim involves questions of law, which require de novo review, and commenting that agencies "occupy a subordinate status in our system of government").

110. *Id.* at *4 (asserting that decisions affecting a person's property rights are constitutional in nature and that agencies are not competent to make final constitutional determinations).

111. *Id.* at *10.

112. *Id.* at *10–11.

113. *See id.* at *10–12 (explaining that decisions requiring "constitutional construction [are] inherent in, and exclusive to, the judiciary").

114. *See id.* at *11 (distinguishing certain legal and factual determinations as "outside the competence of administrative agencies").

determinations proved to be too error-prone to sustain adherence by Texas courts.[115]

D. *The Third* Eldridge *Factor: Governmental Interests*

The third *Eldridge* factor considers the administrative and financial burdens that an additional procedural requirement would impose upon public actors.[116] Reviewing courts are sometimes hesitant to impose additional procedural requirements upon administrative tribunals because the requirements "might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in . . . effectiveness."[117] In fact, certain Supreme Court Justices have criticized decisions that interfere with matters that customarily operate outside of the judicial realm.[118] However, the Court has not left local governments that appoint administrative commissions without guidance; instead, it has indicated that local governments should seek to be efficient while placing a high priority on the individual's due process rights.[119]

The *Eldridge* Court acknowledged that the judicial model for hearings may not be best suited for all administrative hearings, and noted that administrative hearing procedures must be customized to ensure that parties are provided a "meaningful opportunity to present their case."[120] The degree to which a burden is imposed

115. *See id.* at *13 ("[T]he constitutionality of a property's demolition . . . [is] outside the competence of administrative agencies." (citation omitted)); *cf.* Mathews v. Eldridge, 424 U.S. 319, 341–42 (1976) (stating that an administrative hearing conducted without the involvement of a trial judge, and the subsequent delay before involving a trial judge, constituted a deprivation of property).

116. *Eldridge*, 424 U.S. at 347–48.

117. Goss v. Lopez, 419 U.S. 565, 583 (1975) (requiring minimal due process before suspending a student).

118. *See id.* at 594 (Powell, J., dissenting) (criticizing the majority's holding for imposing due process requirements in the educational realm to address "many of the most routine problems arising in the classroom"); *see also* Univ. of Tex. Med. Sch. at Hous. v. Than, 901 S.W.2d 926, 934 (Tex. 1995) (expressing criticism that order interferes with current educational processes and that "courts should tread lightly in fashioning remedies for due process violations that affect the academic decisions of state-supported universities").

119. *See* Goldberg v. Kelly, 397 U.S. 254, 266 (1970) (suggesting that the state could, by employing "prompt [pretermination] hearings and . . . skillful use of personnel and facilities," reduce its administrative and financial costs).

120. *See Eldridge*, 424 U.S. at 348–49 (recognizing that due process merely requires

upon a governmental body depends on the nature of the added procedural requirement.[121] Reviewing courts' hesitancy to impose additional procedural requirements stems from the notion that the governmental entities are in a better position to consider the respective costs of an added requirement because they must ultimately bear these costs.[122]

The government has an interest in efficiency to avoid not only a backlog of appeals, but also to avoid increased litigation costs and drawn-out administrative hearings.[123] In many building and standards commission hearings, decisions are made in a methodical and summarized fashion with deference afforded to the findings of building inspectors.[124] With regard to legislative

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notice and an opportunity to be heard and that the procedures necessary to meet this threshold will vary depending on what is at stake).

121. *See* Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1278 (1975) ("The required degree of procedural safeguards varies directly with the importance of the private interest affected and the need for and usefulness of the particular safeguard in the given circumstances and inversely with the burden and any other adverse consequences of affording it." (citation omitted)).

122. *See id.* at 1302–03 (explaining the difficulty reviewing courts have weighing the costs and benefits of a given procedural safeguard under different circumstances); *cf.* Bryan M. Seiler, Note, *Moving from "Broken Windows" to Healthy Neighborhood Policy: Reforming Urban Nuisance Law in Public and Private Sectors*, 92 MINN. L. REV. 883, 902 (2008) (arguing that part of the reason there is scant judicial scrutiny of public nuisance decisions is because legislators are in the best position to balance competing interests).

123. *See* Waters v. Churchill, 511 U.S. 661, 675 (1994) (acknowledging that the government has an interest in reaching its goals as efficiently and effectively as possible); *Eldridge*, 424 U.S. at 335, 347–48 (including the costs of increased due process requirements and the associated administrative burden as considerations for striking the appropriate balance).

124. *See* CITY OF MCKINNEY, TEX., BUILDING AND STANDARDS COMMISSION MEETING MINUTES (Feb. 11, 2008), *available at* http://www.mckinneytexas.org/agendas/councilmeetings/031808/ (follow "3 Consent Agenda" hyperlink; then follow "3-1 Minutes" hyperlink; then follow "8-124 BSC 2-11-08 Minutes.doc" hyperlink to download document) (ruling that if almost every property owner did not obtain a permit within thirty days, repair the property, and have it inspected, the city would seek a demolition order and place a lien upon the properties); CITY OF TEXARKANA, TEX., BUILDING AND STANDARDS COMMISSION MEETING MINUTES (Apr. 21, 2008), *available at* http://www.ci.texarkana.tx.us/departments/bscommission/minutes/20101102.pdf (ordering demolition, upon recommendation of the building inspector, of seven of the ten properties brought before the commission); *City of Texarkana, Texas Demolition Inspection Modified*, CITY OF TEXARKANA, TEX., (Dec. 10, 2009), http://www.ci.texarkana.tx.us/citynews.html?sid=167 (describing a change in the demolition process from a "complaint driven" process to one where inspectors independently tag substandard housing, classify tagged properties, and follow a process based on the classification); CITY OF WACO, TEX., BUILDING STANDARDS COMMISSION MEETING MINUTES paras. C–D

amendments that limit reviewing courts to only a substantial evidence standard of review,[125] the City of San Antonio remarked that "the purpose of the amendments was to allow limited judicial review without the delay and expense that would come from allowing a trial de novo by the district court."[126] Legislative history of these amendments confirms this purported interest.[127] The Texas Legislature sought not only to clarify the standard of review to be used by district courts, but also to expedite appeals that seek review of local administrative commissions regulating public nuisances.[128]

The City of San Antonio and the City of Houston noted that they are faced "[w]ith an aging and deteriorating housing stock" that will only increase the number of properties subject to public nuisance hearings.[129] The cities also claimed that the economic crisis has resulted in property owners "walking away from properties that they can no longer afford."[130] Therefore, "[t]he number of vacant and abandoned structures continues to rise daily with no one to maintain them and prevent their decay."[131] Courts are readily cognizant of the government's interest in eliminating any risks that result from decaying properties.[132] In accordance

(May 5, 2010), *available at* http://www.waco-texas.com/pdf/agendas/Building%20Standards/05-04-11%20Minutes.pdf (ordering demolition in seventeen out of twenty-two property hearings scheduled before the commission, based primarily on "staff recommendations").

125. *See infra* Part IV.C (describing and analyzing the standard of review applied to decisions of building and standards commissions).

126. Brief for City of San Antonio & City of Houston as Amici Curiae Supporting Petitioner at 10, City of Dallas v. Stewart, 55 Tex. Sup. Ct. J. 271, 2012 WL 247966 (Jan. 27, 2012) (No. 09-0527), 2009 WL 3169323, at *10.

127. *See* H. COMM. ON URBAN AFFAIRS, BILL ANALYSIS, TEX. H.B. 333, 73d Leg., R.S., at 88–89 (1993), *available at* http://www.lrl.state.tx.us/scanned/hroBillAnalyses/73-0/HB333.pdf ("Currently, court cases can extend indefinitely; this bill would guarantee quicker action. [The amendment] also would clarify the standard of review for administrative cases. City hearings often lose their meaning when a district court judge can completely [retry] the case.").

128. *See id.* at 87–89 (limiting district courts to review using the substantial evidence standard and explaining how this increases the speed with which these problems can be resolved).

129. Brief for City of San Antonio & City of Houston as Amici Curiae Supporting Petitioner at 13, *Stewart*, 2012 WL 247966 (No. 09-0527), 2009 WL 3169323, at *13.

130. *Id.*

131. *Id.*

132. *See* Freeman v. City of Dallas, 242 F.3d 642, 652–53 (5th Cir. 2001) (stating that [r]egulation of nuisance properties is at the heart of the municipal police power" and that

with the interests of efficiency and protecting the public welfare, courts must consider the extent to which an additional procedural safeguard will burden the government.

IV. SPECIFIC DUE PROCESS RIGHTS

This Comment part examines specific due process safeguards and their application to building and standards commissions under the *Eldridge* balancing approach. A few of the rights specified in this section are provided by statute and will be indicated as such.

A. *Appointment of Counsel*

Generally, indigents have a right to appointed counsel "only when, if [the indigent] loses, he may be deprived of his physical liberty."[133] However, the United States Supreme Court has expressed that, at the very least, persons appearing before governmental administrative commissions must be allowed to retain an attorney.[134] While this allowance may seem very limited, in *Lassiter v. Department of Social Services*,[135] a majority of the Court acknowledged a right to counsel when a "unique kind of deprivation" may occur, such as termination of parental rights.[136] The Court acknowledged that the second *Eldridge* factor is militated when both parties are represented by counsel because "interests may become unwholesomely unequal" when only one party is represented.[137] Also, with regard to the third *Eldridge* factor, the Court acknowledged that although pecuniary interests are rightfully a consideration, they are "hardly significant

"[i]t is eminently reasonable for a city to prescribe minimum property maintenance standards to protect the public and to maintain adjacent land values"); *Stewart*, 2012 WL 247966, at *1 (acknowledging that "[c]ities must be able to abate . . . nuisances to avoid disease and deter crime").

133. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 26–27 (1981).

134. *See* Goldberg v. Kelly, 397 U.S. 254, 270–71 (1970) (declaring that the recipient of welfare is allowed to retain an attorney for pretermination hearings in accordance with the recipient's due process rights, because "[c]ounsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient").

135. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981).

136. *Id.* at 27.

137. *Id.* at 28; *accord id.* at 46 (Blackmun, J., dissenting) (noting the unequal and potentially insurmountable task of an indigent party facing "a [s]tate that commands great investigative and prosecutorial resources").

enough to overcome private interests as important as those [found in parental termination proceedings]."[138] However, the Court ultimately declined to hold that indigents have a right to counsel in all parental termination proceedings, instead holding that the determination of whether counsel should be appointed is made on a case-by-case basis.[139]

In *Lassiter*, the Court provided relevant factors to consider when making a determination of whether counsel should be appointed in administrative hearings: (1) whether the presence of counsel would likely have rendered a different outcome; (2) the potential gravity of loss to an individual in a proceeding; and (3) the complexity of the case.[140] In a dissenting opinion, Justice Blackmun argued that the complexity of a legal proceeding, stemming from legal issues that "are neither simple nor easily defined," coupled with the burden to present evidence, are important considerations to be made when confronting this issue.[141] Similarly, Judge Friendly has noted that "effective cross-examination of experts, and of most other witnesses, would almost inevitably require the aid of counsel."[142]

Nuisance abatement procedures share the aforementioned characteristics; the legal standards found in municipal ordinances and state statutes are not easily defined and are open to

138. *Id.* at 28 (majority opinion).

139. *Id.* at 31–32. *But cf. id.* at 49 (Blackmun, J., dissenting) (differentiating from the majority's holding by stating that "[t]he flexibility of due process . . . requires case-by-case consideration of different decision-making *contexts*, not of different *litigants* within a given context[,]" and that a rule can be formulated for "similarly situated cases"). Justice Stevens added an additional element to Justice Blackmun's analysis and stated that counsel should have been appointed in a proceeding determining parental rights, asserting that the principle issue "is one of fundamental fairness, not of weighing the pecuniary costs against the societal benefits." *Id.* at 60 (Stevens, J., dissenting).

140. *Id.* at 31 (majority opinion). *Compare id.* at 32–33 ("[T]he weight of the evidence that she had few sparks of such interest was sufficiently great that the presence of counsel for [the defendant] could not have made a determinative difference."), *with id.* at 51 (Blackmun, J., dissenting) (arguing that a determination of whether the assistance of counsel would have rendered a different outcome is more complex than the majority opinion asserts, pointing out that this determination "becomes possible only through imagination, investigation, and legal research focused on the particular case" and that the court "might be hard pressed to discern the significance of failures to challenge the State's evidence or to develop a satisfactory defense").

141. *Id.* at 45–46 (Blackmun, J., dissenting).

142. Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1285 (1975).

interpretation by both building inspectors and members of building and standards commissions.[143] Furthermore, witnesses who testify on behalf of a city or municipality are not always building inspectors and can include other witnesses, such as medical experts.[144] Having an attorney present better enables an individual to challenge many of the factual assertions to which these experts attest.

Justice Blackmun also argued that an indigent defendant "cannot possibly succeed without being able to identify material issues, develop defenses, gather and present sufficient supporting nonhearsay evidence, and conduct cross-examination of adverse witnesses."[145] The same can be said for individuals appearing before building and standards commissions because it is not clear whether property owners are fully aware of their rights or the testimony they will face.[146] Hearings before building and standards commissions are a unique type of hearings built around consensus and community values.[147] Although these hearings can

143. For example, the San Antonio ordinance defines a "dangerous building" as a structure that has "such conditions or defects of dilapidation, substandardness, or unfitness for human habitation." SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 6, art. VIII, § 6-156 (2008), *available at* http://library.municode.com/index.aspx?clientId= 11508& stateId=43&stateName=Texas (follow "Chapter 6-Buildings" hyperlink; then follow "Article VIII-Dangerous Buildings and Distressed Property" hyperlink; then follow "Sec. 6-156" hyperlink).

144. Reports with regard to hearings before San Antonio's DSDB set forth the testimony of police officers. Elaine Wolff, *Kangaroo Court (Part I): Meet the City's New Extra-Constitutional Crime-Fighting Tool*, SAN ANTONIO CURRENT, Apr. 21, 2010, http://www2.sacurrent.com/printStory.asp?id=71078. Commission members are prescribed by statute with the right to call witnesses without abiding to all formal courtroom rules of evidence. TEX. LOC. GOV'T CODE ANN. § 54.034(d) (West 2008) (expressing merely that commission members "*may* administer oaths" while allowing the commission members to call witnesses (emphasis added)); TEX. GOV'T CODE ANN. § 2001.081 (West 2008) (extending rules of evidence to administrative hearings only when the case is "contested" but also codifying three general exceptions to situations when the rules of evidence may not be applicable).

145. *Lassiter*, 452 U.S. at 45–46 (Blackmun, J., dissenting).

146. *Cf.* ILYA SOMIN, THE CIVIL RIGHTS IMPLICATIONS OF EMINENT DOMAIN ABUSE: TESTIMONY BEFORE THE UNITED STATES COMMISSION ON CIVIL RIGHT 1–12 (2011), *available at* http://www.law.gmu.edu/assets/files/faculty/Somin_USCCR-aug 2011.pdf (discussing the impact of governmental violations of property rights on minorities).

147. *See generally* Jamestown Partners, L.P. v. City of Fort Worth, 83 S.W.3d 376 (Tex. App.—Fort Worth 2002, pet. denied) (illustrating that the creation and utilization of buildings and standards commissions are governed at the municipality level).

be quite amicable and cooperative, property owners may nevertheless face an uphill battle against public actors who are armed with more resources and extensive familiarity with public nuisance hearings.[148]

Moreover, Justice Blackmun argued that the *Lassiter* majority incorrectly considered the gravity of the potential loss, asserting that loss of parental rights is far more "precious" than any kind of property right.[149] He then described property rights as "liberties which derive merely from shifting economic arrangements."[150] However, a person's ownership of a primary residence is more than a mere "economic arrangement," as evidenced by the special, protected treatment that real property rights are given under state laws.[151] Therefore, while deprivation of one's primary residence may not be of the same gravity as deprivation of parental rights, it is nevertheless an important right that is of significant value in American law.[152]

Although the assistance of counsel would be useful in hearings before building and standards commissions, the disadvantages of appointing counsel are substantial. Justice Black, in a dissenting opinion in *Goldberg v. Kelly*,[153] scoffed at the idea that an attorney should be appointed in an administrative proceeding evaluating the right to welfare benefits.[154] He argued that appointed counsel would lead to the onset of burdensome

148. Commentators have taken note of the systematic bias that can be found in public nuisance hearings between public actors and individual property owners and how the latter parties stand little chance of success. Bryan M. Seiler, Note, *Moving from "Broken Windows" to Healthy Neighborhood Policy: Reforming Urban Nuisance Law in Public and Private Sectors*, 92 MINN. L. REV. 883, 885 (2008).

149. *Lassiter*, 452 U.S. at 38 (Blackmun, J., dissenting) (citing May v. Anderson, 345 U.S. 528, 533 (1953)).

150. *Id.* (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)) (internal quotation marks omitted).

151. *See* TEX. PROP. CODE ANN. § 41.001(a) (West Supp. 2011) (declaring that one's homestead is exempt from seizure by claims of certain creditors).

152. *See* Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135, 1136 (1980) (asserting that the need to secure property rights was an important value to American law's early constitutional period).

153. Goldberg v. Kelly, 397 U.S. 254 (1970).

154. *See id.* at 278 (Black, J., dissenting) (arguing that allowing welfare recipients to retain counsel for administrative proceedings will lead to prolonged delays in the judicial process).

consequences, as there would be administrative delays of perhaps "several years" and local governments would be forced to make an "exhaustive investigation" whenever they issue a ruling.[155] Judge Friendly has commented that in the American adversarial system of justice, the role of counsel is not necessarily to ensure that justice is served but, instead, to advance the cause of the client.[156] According to this school of thought, attorneys will often create a confrontational atmosphere and diminish the benefits of local administrative commissions, which often reach amicable, cooperative solutions.[157] Although Judge Friendly used the example of disciplinary hearings in prison, corollaries can be drawn to hearings before building and standards commissions because they do not necessarily have to be approached in an adversarial context.[158] If board members already engage in behavior that takes into account the needs of property owners and their willingness to make good-faith efforts to repair deficiencies, attorneys may only exacerbate the cooperative and considerate nature of the hearings.

To date, no court has held that indigents have a right to appointed counsel in public nuisance hearings.[159] The costs to local governments would be rather extensive, and it is questionable whether having an attorney present would substantially alter the outcomes of public nuisance hearings or have a beneficial effect at all.[160] However, allowing property owners to have an attorney represent them before building and standards commissions should not be discouraged. Attorney

155. *Id.* at 278–79.

156. Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1288 (1975) (citing Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975)).

157. *Id.*

158. *See* Sclavenitis v. City of Cherry Hills Vill. Bd. of Adjustment & Appeals, 751 P.2d 661, 663 (Colo. App. 1988) (noting that administrative hearings are not necessarily conducted under strict procedural or evidentiary dictates (citing Nat'l Heritage, Inc. v. Pritza, 728 P.2d 737 (Colo. App. 1986))).

159. *Cf.* Iraheta v. Superior Court, 83 Cal. Rptr. 2d 471, 473 (Ct. App. 1999) (denying request to appoint counsel for indigent defendants in civil action seeking injunction to abate public nuisance by declaring that "[t]he right to counsel has been recognized to exist on where the litigant may lose his physical liberty if he loses the litigation").

160. *Cf.* Henry J. Friendly, "*Some Kind of Hearing*", 123 U. PA. L. REV. 1267, 1276 (1975) (opining that at some point any benefit from providing additional safeguards will be outweighed by the cost of providing the benefit).

assistance helps satisfy the second *Eldridge* factor because attorneys can ensure that a property owner is afforded the full extent of her rights and that the client is given a chance to present her arguments without improper restraint from local administrative commissions.[161]

B. *Notice*

Notice is a fundamental part of due process in all kinds of administrative proceedings,[162] and the regulation of public nuisances is no different.[163] Notice must be executed in a reasonable manner to adequately inform the parties of proceedings that may affect their legal rights.[164] Notice of each order must be given so that property owners or other interested parties are provided knowledge of the full extent of their rights and legal obligations, especially with regard to orders to repair or demolish their property.[165] Accordingly, if an owner does not comply with an order to repair or demolish a structure, notice must be given to any lienholder or mortgagee so he may have an opportunity to cure the condition creating the nuisance.[166]

Under the current statutory framework for regulation of public

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161. *Cf.* Goldberg v. Kelly, 397 U.S. 254, 270 (1970) (pointing out that the right to be heard is of little use without the right to counsel).

162. *See* Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1280 (1975) (arguing that in administrative proceedings it is "fundamental that notice be given and that it timely and clearly inform[s] the individual of the proposed action and the grounds for it").

163. *See* TEX. LOC. GOV'T CODE ANN. § 214.001(b) (West Supp. 2011) (requiring that an ordinance provide notice and an opportunity to be heard); *see also* City of Waco v. Roddey, 613 S.W.2d 360, 365–66 (Tex. Civ. App.—Waco 1981, no writ) (extending notice requirements to building and standards commission orders).

164. Armstrong v. Manzo, 380 U.S. 545, 550 (1965); *Roddey*, 613 S.W.2d at 365.

165. *See* Kinnison v. City of San Antonio, 699 F. Supp. 2d 881, 890 (W.D. Tex. 2010) (denying summary judgment after finding that the City of San Antonio failed to adequately provide evidence that it complied with all notice provisions and orders); *Roddey*, 613 S.W.2d at 365–66 (holding that building and standards commission must provide adequate notice when issuing an order to demolish property). *But see* City of Dallas v. Wilson, 602 S.W.2d 113, 116 (Tex. Civ. App.—Dallas 1980, no writ) (declining to hold that "final notice" of demolition was required to be provided when a new property owner was on notice of previous opportunities to cure and failed to do so, as the former notice was not statutorily required).

166. LOC. GOV'T § 214.001(d); State Bank of Omaha v. Means, 746 S.W.2d 269, 272 (Tex. App.—Texarkana 1988, writ denied) (citing City of Texarkana v. Reagan, 112 Tex. 317, 247 S.W. 816, 818 (1923)).

nuisances in Texas, a local government must set forth a "diligent effort" to locate the proper identity and address of an owner, mortgagee, or lienholder.[167] In accordance with this diligent effort, Texas law requires the municipality to search six public sources for the aforementioned parties before it can be said that sufficient notice was provided.[168] Furthermore, Texas courts have been steadfast in requiring local governments to provide adequate notice to a property owner when her address is otherwise available or when an address can be readily ascertained through means differing from those statutorily required.[169]

These statutory and corresponding precedential requirements represent an increased effort to provide actual notice, as opposed to other jurisdictions where haphazard notice has survived review.[170] The promulgation of these high standards came in the wake of reports that the City of Dallas was not giving proper notice.[171] Sufficient notice can rightfully be considered an integral part of the second *Eldridge* factor.[172] One court has stated that

167. LOC. GOV'T § 214.001(q).

168. *Id.*; *accord Kinnison*, 699 F. Supp. 2d at 890–91 n.16 (stating that "[t]he list is conjunctive rather than disjunctive" and ruling against the City of San Antonio for failing to provide notice to the rightful owner after a city official failed to evaluate various public records). The list includes records from the county's real property office, appraisal district's office, secretary of state, and tax and utility records from the municipality. LOC. GOV'T § 214.001(q).

169. City of Houston v. Fore, 412 S.W.2d 35, 39 (Tex. 1967) (citing Wis. Elec. Power Co. v. City of Milwaukee, 81 N.W.2d 298 (Wis. 1957)); *accord Roddey*, 613 S.W.2d at 365 (holding that notice by publication is insufficient when the correct address could have been discovered by examining public records or by asking former neighbors (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 319 (1950); *Fore*, 412 S.W.2d at 38; Jones v. City of Odessa, 574 S.W.2d 850, 852 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.))).

170. *See, e.g.*, Tea v. City of St. Paul, No. A08-1686, 2009 WL 1853001, at *3 (Minn. Ct. App. June 30, 2009) (upholding notice when the city could have determined the identity of the owner by merely searching the chain of title but posted a notice on the actual property instead).

171. *See* Denise Mcvea, *Razing Hopes (Part II): Thousands of People in Dallas Need a Cheap Place to Live. So Why Is the City Destroying Homes that Could be Saved?*, DALL. OBSERVER, Nov. 2, 1995, http://www.dallasobserver.com/1995-11-02/news/razing-hopes-part-ii/ (reporting that there were significant flaws in the notification process and that the operations were "run by inexperienced clerks using outdated records").

172. *See generally* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (promulgating three factors, the second of which is "the risk of an erroneous deprivation of [a party's] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards").

"[t]he value of notice as an additional procedural safeguard would substantially diminish the chance of an erroneous deprivation of property."[173]

C. *Judicial Review*

The right to judicial review of an administrative factual determination has traditionally been and continues to be recognized at common law.[174] The Texas Legislature has codified the substantial evidence standard of review for orders of local administrative tribunals regulating public nuisances, such as building and standards commissions.[175] However, in *Stewart*, the Texas Supreme Court held that de novo judicial review is required for all administrative decisions regulating public nuisances.[176] Thus, this decision has all but directly overturned the aforementioned statute mandating the substantial evidence standard.[177]

The substantial evidence standard of review limits a reviewing court to consider only the evidence brought before the building

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173. *Kinnison*, 699 F. Supp. 2d at 893.

174. *See* Potashnick Truck Serv. Inc. v. City of Sikeston, 173 S.W.2d 96, 100 (Mo. 1943) (affirming that persons challenging a nuisance order are entitled to judicial review as a procedural safeguard); Golden v. Health Dep't, 47 N.Y.S. 623, 625–26 (App. Div. 1897) (declaring that it is a necessity that property owners have the opportunity to obtain judicial review of orders issued by the board of health that diminish the value of their properties); s*ee also* Tex. Health Facilities Comm'n v. Charter Med.-Dall., Inc., 665 S.W.2d 446, 450–53 (Tex. 1984) (asserting that the factual determinations of an administrative agency can be subject to judicial review).

175. TEX. LOC. GOV'T CODE ANN. § 214.0012(f) (West 2008). The statutory enactment of the substantial evidence standard of review comports with due process. *See* Cedar Crest No. 10, Inc. v. City of Dallas, 754 S.W.2d 351, 353 (Tex. App.—Eastland 1988, writ denied) (overruling a property owner's claim that a city ordinance was invalid because it used the substantial evidence standard, which he claimed prevented a proper judicial determination).

176. *See* City of Dallas v. Stewart, 55 Tex. Sup. Ct. J. 271, 2012 WL 247966, at *5–7 (Jan. 27, 2012) (discussing current precedents mandating judicial review of nuisance determinations).

177. *See* Como v. City of Beaumont, 345 S.W.3d 786, 792 (Tex. App.—Beaumont 2011, pet. filed) (applying *Stewart* and holding that the plaintiff was entitled to de novo review of her constitutional claims in the trial court). *Compare Stewart*, 2012 WL 247966, at * 4 (holding that "[b]ecause substantial evidence review of a nuisance determination resulting in a home's demolition does not sufficiently protect a person's rights [against eminent domain takings]," de novo judicial review was proper in the situation), *with* LOC. GOV'T § 214.0012(f) (stating that appeals of agency decisions for judicial review shall be heard pursuant to the substantial evidence rule).

and standards commission when making its determination.[178] In addition, a building and standards commission's factual determination will be upheld if there is "more than a scintilla of evidence to support [it] . . . even if the evidence preponderates against the commission's determination."[179] A reviewing court is also limited to a "test of reasonableness."[180]

The de novo standard of review, on the other hand, is radically different from the substantial evidence standard.[181] A pure trial de novo involves vacating the administrative decision completely and essentially retrying the case.[182] Under de novo review, a trial court reviewing an administrative public nuisance claim will make its determination without any deference to the administrative commission's decision and is free to consider new evidence.[183]

The specific procedures for requesting judicial review have also been codified.[184] These procedures require a party challenging an order to allege the illegality of the order and request that a reviewing court issue a writ of certiorari.[185] The challenging party bears the burden of proof as to whether the order meets the substantial evidence standard.[186] However, after *Stewart*, this statute has also become virtually meaningless because commission orders will be afforded no deference.[187] Agency decisions will no

178. LOC. GOV'T § 214.0012(f); Perkins v. City of San Antonio, 293 S.W.3d 650, 654 (Tex. App.—San Antonio 2009, no pet.); *In re* Edwards Aquifer Auth., 217 S.W.3d 581, 586–87 (Tex. App.—San Antonio 2006, no pet.) (per curiam).

179. Mireles v. Tex. Dep't of Pub. Safety, 9 S.W.3d 128, 131 (Tex. 1999) (citing R.R. Comm'n v. Torch Operating Co., 912 S.W.2d 790, 792–93 (Tex. 1995)).

180. Lewis v. Metro. Sav. & Loan Ass'n, 550 S.W.2d 11, 13 (Tex. 1977).

181. W. Wendell Hall et al., *Hall's Standards of Review in Texas*, 42 ST. MARY'S L.J. 3, 72 (2010).

182. *See id.* at 71–72 (stating that a reviewing court makes a determination on each issue of fact and law as it would in any other civil case).

183. *Id.* at 72.

184. *See* TEX. LOC. GOV'T CODE ANN. § 214.0012 (West 2008) (setting forth procedures for judicial review of decisions made by a municipality regarding land use, structures, or other activities).

185. *Id.* § 214.0012(a)–(b); Martinez v. City of El Paso, 169 S.W.3d 488, 492 (Tex. App.—El Paso 2005, pet. denied) (citing Office of Pub. Util. Counsel v. Pub. Util. Comm'n, 895 S.W.2d 712, 714 (Tex. App.—Austin 1993), *rev'd on other grounds*, 878 S.W.2d 598 (Tex. 1994)), *overruled in part by* Tellez v. City of Socorro, 296 S.W.3d 645 (Tex. App.—El Paso 2009, pet. denied).

186. Nussbaum v. City of Dallas, 948 S.W.2d 305, 308 (Tex. App.—Dallas 1996, no writ) (citing *Office of Pub. Util. Counsel*, 895 S.W.2d at 714).

187. *See* City of Dallas v. Stewart, 55 Tex. Sup. Ct. J. 271, 2012 WL 247966, at *28

longer carry the "presumption of validity" afforded under the substantial evidence standard of review.[188]

Prior to the codification of the substantial evidence standard of review, and long before *Stewart*, reviewing courts had more discretion when considering evidence and making determinations of whether property was a public nuisance.[189] Other forms of review gave reviewing courts a greater amount of freedom to review evidence not considered by an administrative commission and to make a new ruling based on this evidence.[190]

In contrast, under the substantial evidence standard, a party must meet a two-prong test to have new evidence considered.[191] First, the party must establish that the evidence is material.[192] Second, the party must demonstrate that there was a legally

(Jan. 27, 2012) (implying that because "[a]gency findings in eminent domain cases are subject to de novo trial court review," the agency's findings are not presumed to be valid); Como v. City of Beaumont, 345 S.W.3d 786, 792 (Tex. App.—Beaumont 2011, pet. filed) (concluding that administrative decisions as to whether property constitutes a public nuisance cannot be final).

188. W. Wendell Hall et al., *Hall's Standards of Review in Texas*, 42 ST. MARY'S L.J. 3, 72 (2010) (quoting G.E. Am. Commc'n v. Galveston Cent. Appraisal Dist., 979 S.W.2d 761, 764 (Tex. App.—Houston [14th Dist.] 1998, no pet.)) (internal quotation marks omitted).

189. *See* Richardson v. City of Pasadena, 513 S.W.2d 1, 4 (Tex. 1974) (allowing a trial court to admit additional evidence on review of an administrative order); City of Houston v. Lurie, 148 Tex. 391, 224 S.W.2d 871, 875 (1949) (expressing doubt that the substantial evidence form of review is adequate in adjudicating review of the administrative board and stating "[t]he authority to decide such a question involves the exercise of judicial discretion, and ordinarily includes the authority to weigh evidence, to make findings of fact, and to apply rules of law"). *But cf.* Lewis v. Metro. Sav. & Loan Ass'n, 550 S.W.2d 11, 16 (Tex. 1977) (holding that the usual test for reviewing an administrative decision on its factual determination is the substantial evidence standard of review); J.B. Adver., Inc. v. Sign Bd. of Appeals, 883 S.W.2d 443, 449 (Tex. App.—Eastland 1994, writ denied) (holding that proper review of an administrative order is not necessarily a trial de novo but instead "[r]eview . . . is limited to determining whether the board abused its discretion").

190. *See In re* Edwards Aquifer Auth., 217 S.W.3d 581, 586 (Tex. App.—San Antonio 2006, no pet.) (per curiam) (comparing pure trial de novo and substantial evidence de novo with "pure substantial evidence" and concluding that the first two forms allow a reviewing court to consider additional evidence that may not have been offered at the evidentiary hearing).

191. *See* TEX. GOV'T CODE ANN. § 2001.175(c) (West 2008) (allowing a court to order that additional evidence be presented to an agency when the evidence is material and "there were good reasons for the failure to present it" previously).

192. *Id.*; Bexar Metro. Water Dist. v. Tex. Comm'n on Envtl. Quality, 185 S.W.3d 546, 554–55 (Tex. App.—Austin 2006, pet. denied); Occidental Permian, Ltd. v. R.R. Comm'n, 47 S.W.3d 801, 810 (Tex. App.—Austin 2001, no pet.).

sufficient reason for failure to produce the evidence originally.[193] Thereafter, the reviewing court will make a decision, and if the challenger proved the two prongs, the cause will be remanded to be tried again before a local administrative commission.[194] Overall, the substantial evidence rule represents an attempt by the state legislature to grant deference to the factual findings of administrative commissions regulating public nuisances.[195] In fact, one court has described the substantial evidence rule as a "device to keep the courts out of the business of administering regulatory statutes enacted by the [l]egislature."[196]

While the substantial evidence standard promoted efficiency, thereby comporting with the third *Eldridge* factor, it also increased the risk of error inherent in the administrative process, thereby exacerbating the second *Eldridge* factor.[197] Property owners were discouraged in their efforts to appeal a decision in light of the substantial evidence standard of review, and questionable decisions were left undisturbed.[198] Furthermore, the substantial evidence standard cloaked members of building and standards commissions with enormous power since their decisions were essentially final.[199] Despite these concerns, at least one Texas

193. GOV'T § 2001.175(c); *Bexar Metro. Water Dist.*, 185 S.W.3d at 554–55; *Occidental Permian*, 47 S.W.3d at 810.

194. GOV'T § 2001.175(c).

195. State Banking Bd. v. Allied Bank of Marble Falls, 748 S.W.2d 447, 448 (Tex. 1988) (per curiam); Tex. Alcoholic Beverage Comm'n v. I Gotcha, Inc., No. 07-05-0411-CV, 2006 WL 2095449, at *2 (Tex. App.—Amarillo July 28, 2006, pet. denied) (mem. op.).

196. Lewis v. Metro. Sav. & Loan Ass'n, 550 S.W.2d 11, 13 (Tex. 1977).

197. *See* Mathews v. Eldridge, 424 U.S. 319, 343, 347 (1976) (listing the second and third *Eldridge* factors to be the "the fairness and reliability of the existing procedures" and any additional value of additional procedures, and the administrative burden and societal costs, respectively).

198. Tex. Health Facilities Comm'n v. Charter Med.-Dall., Inc., 665 S.W.2d 446, 453 (Tex. 1984); City of San Antonio v. Tex. Water Comm'n, 407 S.W.2d 752, 758 (Tex. 1966); Ysleta Indep. Sch. Dist. v. Meno, 909 S.W.2d 544, 552 (Tex. App.—Austin 1995), *rev'd on other grounds sub nom.* Fetchin v. Meno, 916 S.W.2d 961 (Tex. 1996); *cf.* Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1313–14 (1975) (criticizing the procedural requirements for reviewing administrative decisions with regards to the substantial evidence standard and stating that "the agency must provide '*some mechanism for interested parties to introduce adverse evidence and criticize evidence introduced by others*'" (quoting Mobil Oil Corp. v. Fed. Power Comm'n, 483 F.2d 1238, 1258 (D.C. Cir. 1973))).

199. *See* Oscar Javier Ornelas, *Justified Reasoning for Reasonable Minds: The*

court did not think twice about whether this standard conformed to due process requirements.[200]

However, as long as *Stewart* is not overturned, judicial review of commission decisions will remain wide open.[201] Aggrieved property owners may now appeal to state trial courts with a greater chance of successfully obtaining a reversal of the local administrative tribunal's decision.[202] In making its ruling, the *Stewart* court recognized the gravity of the individual's interest affected at commission hearings, which is the first *Eldridge* factor.[203] The court also acknowledged that members of commissions regulating public nuisances are not competent to make decisions of law, thereby criticizing the statutory scheme enacted as being conducive to legal mistakes and not otherwise comporting with the second *Eldridge* factor.[204] Although the court may not have admitted it, *Stewart* championed a victory for property owners under the *Eldridge* due process analysis by holding that de novo review is required for administrative hearings regulating public nuisances.[205]

However, the court ignored the third factor of the *Eldridge* balancing approach—the government's interests.[206] Judge

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Reasoning Behind Standards of Judicial Review of Administrative Decisions in Texas, 1 TEX. TECH J. TEX. ADMIN. L. 235, 261 (2000) ("The power of administrative bodies to make findings of fact which may be treated as conclusive, if there is evidence both ways, is a power of enormous consequence."); *see also Charter Med.-Dall.*, 665 S.W.2d at 452 (allowing reversal of agency decisions for "absence of substantial evidence only if such absence has prejudiced substantial rights of the litigant"); *Meno*, 909 S.W.2d at 552 (permitting reversal only when record shows error).

200. *See* Cedar Crest No. 10, Inc. v. City of Dallas, 754 S.W.2d 351, 353 (Tex. App.—Eastland 1988, writ denied) (overruling property owner's claim that a city ordinance is invalid for using substantial evidence standard based on principles of due process).

201. *See* City of Dallas v. Stewart, 55 Tex. Sup. Ct. J. 271, 2012 WL 247966, at *14 (Jan. 27, 2012) (holding that constitutional claims will be reviewed de novo).

202. *See id.* at *28 (Guzman, J., dissenting) (cautioning that the court's decision "opens the door to a host of takings challenges to agency determinations of every sort").

203. *See id.* at *9 (majority opinion) (requiring judicial review when general statutory terms had to be applied to specific facts).

204. *See id.* at *11–12 (noting that accountability is especially weak at the agency level).

205. *See id.* at *14 (rejecting finality of administrative decisions on constitutional questions).

206. *See id.* (acknowledging that private interests are a factor to consider, but overlooking the factor laid out by *Eldridge* regarding government interests (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976))); *see also Eldridge*, 424 U.S. at 335 (listing governmental interests as the third factor to consider when determining proper due

Friendly cautioned against the prospect of increased review of local administrative decisions, and noted that "[t]he spectacle of a new source of litigation of this magnitude is frightening."[207] Furthermore, Judge Friendly stated that this is one area where reviewing courts ought to exercise "self-restraint."[208] State attorneys and local governments may now be forced to conduct full-blown discovery at the trial court, which would rapidly increase the cost of abating many structures.[209] The Texas Legislature likely anticipated the potential for a rapid increase in the amount of appeals, as Judge Friendly warned against, when codifying the substantial evidence standard.

Courts will declare administrative commission decisions to be "arbitrary" as an additional safeguard for individuals subjected to improper decisions by local administrative commissions.[210] Typically, a ruling that an ordinance or order is arbitrary will be intertwined with considerations of due process.[211] However, challenging a decision as arbitrary is a distinct ground for overturning an administrative decision.[212]

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process).

207. Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1295 (1975).

208. *Id.*

209. *See, e.g.*, *Stewart*, 2012 WL 247966, at *28 (Guzman, J., dissenting) (arguing that summary nuisance abatement is the more judicially efficient means to review takings challenges); Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1276 (1975) (commenting that eventually the costs of additional safeguards will outweigh any possible benefits).

210. *See* Tex. Health Facilities Comm'n v. Charter Med.–Dall., Inc., 665 S.W.2d 446, 454 (Tex. 1984) (discussing cases utilizing the arbitrary and capricious standard of review).

211. *See id.* (holding that a decision of an administrative agency can be "arbitrary and capricious . . . when a denial of due process has resulted in the prejudice of substantial rights of a litigant"); Perkins v. City of San Antonio, 293 S.W.3d 650, 654 n.2 (Tex. App.—San Antonio 2009, no pet.) (expressing that a board's order may be reviewed for any "arbitrary action" that "deprives a party of due process"); *see also* Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1314 (1975) (suggesting that if administrative boards want to meet the substantial evidence test or the arbitrary and capricious grounds for reversal then it would be beneficial to integrate adequate procedures of due process into their operations).

212. *Perkins*, 293 S.W.3d at 654 n.2. While the substantial evidence standard and a finding of arbitrariness differ in form, some commentators have suggested that they are essentially the same. *See* Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1313 (1975) (noting that the difference between the two "can readily be exaggerated"); *see also* Murphy v. Rowland, 609 S.W.2d 292, 297 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (expressing that the standard for whether a decision is

Stewart is a narrow and hotly contested five-to-four decision.[213] If *Stewart* is later overturned, it will be important for attorneys challenging commission decisions to include a claim that the administrative decision was arbitrary and capricious. Administrative rulings deemed arbitrary may be overturned, while the same rulings reviewed under the substantial evidence standard are upheld.[214] The Texas Legislature included the arbitrary and capricious grounds for review in the substantial evidence standard of review statute,[215] perhaps intending to limit relief on these grounds.

While the substantial evidence standard and a finding of arbitrariness differ in form, commentators have suggested that they are essentially the same.[216] However, the fact that some courts hold that review of a decision as arbitrary is a different standard may indicate that this form of review should be regarded as an additional ground to attack questionable determinations of administrative commissions.[217]

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arbitrary is whether it "is reasonably supported by substantial evidence" (citing Gerst v. Nixon, 411 S.W.2d 350, 354 (Tex. 1966); Phillips v. Brazosport Sav. & Loan Ass'n, 366 S.W.2d 929, 936 (Tex. 1963))).

213. The majority opinion was written by Chief Justice Jefferson, who was joined by Justices Hecht, Medina, Willett, and Lehrmann. *Stewart*, 2012 WL 247966, at *1. Justices Johnson and Guzman wrote a dissent, joined by Justices Wainright and Green. *Id.* at *12.

214. *See Charter Med.-Dall.*, 665 S.W.2d at 454 (distinguishing between the substantial evidence standard of review based on whether an action is "arbitrary and capricious," and holding that "agency conduct that is arbitrary constitutes an abuse of discretion although that conduct does not amount to a violation of any other provision").

215. The statute specifies that if a decision is "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion," then a reviewing court may reverse and remand the administrative decision. TEX. GOV'T CODE ANN. § 2001.174(2)(f) (West 2008). When ruling on substantive due process challenges to administrative decisions, courts should decide whether the agency made "such a substantial departure from accepted academic norms as to demonstrate that the person or committee did not actually exercise professional judgment." Roberts v. Hous. Indep. Sch. Dist., 788 S.W.2d 107, 110 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (quoting Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985)).

216. *See* Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1313 (1975) (noting that the difference between the two "can readily be exaggerated"); *see also Murphy*, 609 S.W.2d at 297 (expressing the standard for whether a decision is arbitrary is whether the decision "is reasonably supported by substantial evidence" (citing *Nixon*, 411 S.W.2d at 354)).

217. *See* Lewis v. Metro Sav. & Loan Ass'n, 550 S.W.2d 11, 12 (Tex. 1977) (holding that an order of the Savings and Loan Commission was invalid even though "the order may be said to have reasonable factual support under the precepts of the substantial

D. *Cross-Examination*

The right to cross-examine witnesses is regarded as "substantial" in connection with examining the entire scope of evidence and making a complete inquiry into the truth.[218] This right, along with the right to present evidence, has been expressly extended in certain administrative hearings.[219] Furthermore, some courts have expressed outright disapproval of administrative tribunals that attempt to abridge cross-examination through alternative or indirect methods, such as by submitting questions to a board that then redirects the questions to a witness.[220]

However, most administrative tribunals do not abide by formal courtroom rules of evidence.[221] A California court of appeals, in *Mohilef v. Janovici*,[222] commented that turning an administrative public nuisance hearing into a formal judicial proceeding with standard rules of evidence would result in a "cumbersome procedure."[223] The *Mohilef* court argued that standard rules of evidence would ruin the public nature of these proceedings by inserting "legalisms and attorneys into what is currently a process

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evidence rule").

218. *See* Davidson v. Great Nat'l Life Ins. Co., 737 S.W.2d 312, 314 (Tex. 1987) ("Cross-examination is a safeguard essential to a fair trial and a cornerstone in the quest for truth. Longstanding principles of our jurisprudence recognize the right and necessity of full and complete cross-examination."); City of Arlington v. Centerfolds, Inc., 232 S.W.3d 238, 250–51 (Tex. App.—Fort Worth 2007, pet. denied) (holding that denial of cross-examination after board members asked questions of witnesses was improper).

219. Goldberg v. Kelly, 397 U.S. 254, 267–68 (1970); Richardson v. City of Pasadena, 513 S.W.2d 1, 4 (Tex. 1974); *accord* J.B. Adver., Inc. v. Sign Bd. of Appeals, 883 S.W.2d 443, 449 (Tex. App.—Eastland 1994, writ denied) (requiring due process be afforded to a party before an administrative hearing, as this right is "essential to an administrative hearing comporting with due process").

220. *See J.B. Adver.*, 883 S.W.2d at 449 (disapproving of qualifications or restrictions that are placed upon cross-examination and declaring that "requiring parties desiring to cross-examine witnesses to ask questions through the Board places an unjustifiable restriction on their due course of law rights under TEX. CONST. art. I, § 19"); *see also* E & E Hauling, Inc. v. Cnty. of DuPage, 396 N.E.2d 1260, 1263–64 (Ill. App. Ct. 1979) (holding that procedures used in zoning administrative hearing were insufficient because they did not allow cross-examination at the hearing and, instead, only allowed questions to be submitted to the board to rebut a witness's testimony).

221. Bernard Schwartz, *A Decade of Administrative Law: 1987–1996*, 32 TULSA L.J. 493, 536 (1997).

222. Mohilef v. Janovici, 58 Cal. Rptr. 2d 721 (Ct. App. 1996).

223. *Id.* at 736–37.

governed by laypersons."[224] Furthermore, the court noted that witnesses would be forced to retain attorneys to prepare them for testimony, resulting in a costly procedure that may subsequently induce witnesses to not testify at all.[225]

The *Mohilef* court expressly declined to hold that cross-examination is required in administrative public nuisance hearings.[226] In making this determination, the court noted the potential for "havoc" and the resulting administrative burdens that would be imposed on local governments.[227] This decision is noteworthy because the procedures of the administrative tribunal in the case are nearly identical to the procedures employed in hearings before building and standards commissions, although the tribunal in *Mohilef* was a local zoning board.[228] Other similarities are noteworthy—the zoning board in *Mohilef* was decided upon a public nuisance issue, the rules were established by the local government that appointed the board, testimony was considered from a cross section of the public and city employees, and neither the admission of an oath nor cross-examination was undertaken during the board's proceedings.[229]

Although only a state appellate court decision, *Mohilef* may prove instructive as to how courts will rule with regards to cross-examination in public nuisance hearings. While cross-examination militates the second *Eldridge* factor by incorporating rules that seek an increasingly thorough inquiry for the truth of certain facts, the resulting administrative burdens proved to be overwhelming for the *Mohilef* court.[230] In sum, courts may be

224. *Id.*

225. *Id.*

226. *See id.* at 740 (determining that statements given at administrative hearings are informal and the value of cross-examination "is diminished in cases where numerous witnesses testify to the same basic personal experiences").

227. *Id.* at 740–41.

228. Cities may combine building and standards commission hearings with other kinds of hearings relating to real property. *See, e.g.*, *Boards and Commissions*, CITY OF COPPELL, TEX., http://www.ci.coppell.tx.us/boards-and-commissions (last visited Oct. 30, 2011) (stating that the Board of Adjustment also adjudicates Building and Standards Commission hearings).

229. *Mohilef*, 58 Cal. Rptr. 2d at 727–29.

230. *See id.* at 741 (holding that the introduction of cross-examination to administrative proceedings would unduly lengthen hearings, strip them of informality, and encourage witness retention of counsel or silence).

reluctant to require cross-examination because of both the resulting unpleasant effect this could have on the communal nature of proceedings and the administrative delays this requirement would impose.

E. *Record of Decision*

Administrative agencies must, under some circumstances, keep a record of not only their decisions but also their basis for making these decisions.[231] However, this requirement does not entail that the administrative agency issue a full opinion similar to an ordinary court opinion.[232] This requirement is merely to ensure that the decision maker of an administrative hearing is basing his final decision on proper legal and factual grounds.[233]

The Texas Legislature has codified the procedures for record-keeping of local administrative commissions.[234] The commissions are required to keep minutes, which indicate how each member of the commission has voted on each issue.[235] Also, a record of any examination taken is required, and both the minutes and examination records must be properly filed.[236] The minutes and records of examinations must be filed in the office of the respective commission as a public record, ensuring they can be made available to the public upon request.[237] The policy regarding these record-keeping requirements is three-fold: (1) to prevent incorrect decisions; (2) to increase the uniformity of decisions; and (3) to decrease the burden upon local governments, as minimal records will likely be deemed legally adequate.[238]

The statutory framework suggests that each vote of a building and standards commission and all "examinations" be properly

231. Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

232. *Id.*

233. *Id.*

234. *See generally* TEX. LOC. GOV'T CODE ANN. § 54.034 (West 2008) (providing rules for commission proceedings).

235. *Id.* § 54.034(e).

236. *Id.*

237. *Id.*

238. Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1292 (1975). The requirement to keep records "can even be met by checking a list on a card." *Id.*

recorded and filed with the local commission's office,[239] likely because building inspectors' reports are used in almost every abatement proceeding.[240] Furthermore, this requirement demands proper filing and recording of any other testimony presented at a hearing.[241] Some building and standards commissions keep better records than others, but it appears that most of them at least comply with the minimum requirements set forth above.[242]

Record-keeping generally complies with the second *Eldridge* factor by preserving an aggrieved party's right to appeal, enabling the party to challenge certain grounds upon which a local administrative decision was reached.[243] Furthermore, it might seem logical to require detailed record-keeping of minutes due to the gravity of a property owner's potential loss resulting from a building and standards commission decision.[244] Accordingly,

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239. LOC. GOV'T § 54.034(e); *see id.* ("Each commission panel shall keep minutes of its proceedings showing the vote of each member on each question or the fact that a member is absent or fails to vote.").

240. *See, e.g.*, CITY OF MCKINNEY, TEX., BUILDING AND STANDARDS COMMISSION MEETING MINUTES (Feb. 11, 2008), *available at* http://www.mckinneytexas.org/agendas/councilmeetings/031808/ (follow "3 Consent Agenda" hyperlink; then follow "3-1 Minutes" hyperlink; then follow "8-124 BSC 2-11-08 Minutes.doc" hyperlink to download document) (considering the testimony of a building inspector with regard to almost every property); CITY OF WACO, TEX., BUILDING STANDARDS COMMISSION MEETING MINUTES (May 5, 2010), *available at* http://www.waco-texas.com/pdf/agendas/Building Standards/05-04-11Minutes.pdf (showing staff recommendations for most properties).

241. LOC. GOV'T § 54.034(e).

242. *Compare* CITY OF AUSTIN, TEX., BUILDING AND STANDARDS COMMISSION REGULAR MEETING MINUTES (Sept. 22, 2010), *available at* http://www.ci.austin.tx.us/edims/document.cfm?id=144494 (providing detailed information regarding actions taken against property subject to the hearing), *and* CITY OF TEXARKANA, TEX., BUILDING AND STANDARDS COMMISSION MEETING MINUTES (Apr. 21, 2008), *available at* http://www.ci.texarkana.tx.us/departments/bscommission/minutes/20101102.pdf (noting the testimony given for each property and giving a detailed statement of actions taken), *with* CITY OF WACO, TEX., BUILDING STANDARDS COMMISSION MEETING MINUTES paras. C–D (May 5, 2010), *available at* http://www.waco-texas.com/pdf/agendas/Building Standards/05-04-11Minutes.pdf (expressing little to no detail regarding each property subject to the hearing).

243. *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (identifying "the risk of an erroneous deprivation" of a private interest affected by an official action "through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards," as a factor to be considered in the "identification of the specific dictates of due process").

244. *See generally Buildings that are Menaces or Public Nuisances—Removal or Destruction, in* 7A MCQUILLIN MUN. CORP. § 24.557 (3d ed. 2011) ("It is a general rule

because many decisions are based on the reports and findings of building inspectors,[245] proper filing and recording of building inspectors' findings becomes crucial for considerations of due process.

With the advent of judicial de novo review of administrative public nuisance hearings in *Stewart*, record-keeping will likely become less important for due process considerations.[246] Again, local administrative public nuisance determinations will be afforded no weight on appeal; therefore, obtaining a record of this decision becomes virtually meaningless.[247] Reports of building inspectors will not necessarily be required either because a party, through discovery, may obtain a statement or depose the inspector or any other party that issued a statement during the administrative hearing.[248]

F. *Remediation*

A building and standards commission may issue an order for the property owner to do what is necessary to rectify the nuisance instead of demolishing the property entirely.[249] One of the issues

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that a municipality in the exercise of its police power may, without compensation, destroy a building or structure that is a menace to the public safety or health, or require demolition of a dangerous piece of property by the owner.").

245. *See, e.g.*, CITY OF MCKINNEY, TEX., BUILDING AND STANDARDS COMMISSION MEETING MINUTES (Feb. 11, 2008), *available at* http://www.mckinneytexas.org/agendas/councilmeetings/031808/ (follow "3 Consent Agenda" hyperlink; then follow "3-1 Minutes" hyperlink; then follow "8-124 BSC 2-11-08 Minutes.doc" hyperlink to download document) (considering the testimony of a building inspector with regard to almost every property, and basing decisions on "[s]taff recommendation" when the staff includes the same building inspector); CITY OF WACO, TEX., BUILDING STANDARDS COMMISSION MEETING MINUTES paras. C–D (May 5, 2010), *available at* http://www.waco-texas.com/pdf/agendas/Building%20Standards/05-04-11%20Minutes.pdf (accepting the staff recommendations with regard to most properties and listing one of the staff members as the "[i]nspection [s]upervisor").

246. *See* City of Dallas v. Stewart, 55 Tex. Sup. Ct. J. 271, 2012 WL 247966, at *9 (Jan. 27, 2012) (concluding that the URSB's nuisance determination is "subject to de novo review in a trial court").

247. *Id.*

248. *See* W. Wendell Hall et al., *Hall's Standard of Review in Texas*, 42 ST. MARY'S L.J. 3, 72 (2010) (noting that a trial court is free to consider new evidence in a pure de novo review).

249. *See Buildings that are Menaces or Public Nuisances—Removal or Destruction*, *in* 7A MCQUILLIN MUN. CORP. § 24.557 (3d ed. 2011) (cautioning that a city's police power is limited by public necessity, and "property cannot be destroyed if the conditions which make it a menace can be abated in any other recognized way"); CITY OF AUSTIN,

facing a property owner or other interested party is whether remediation of a nuisance is a privilege or a right prior to an order for demolition. Some courts have held that if the condition causing the property to be a nuisance can be remedied through "cleaning, disinfection, alteration, or repair," then these alternatives must be ordered before an order for demolition is made.[250] Furthermore, if a local government contests that remediation is not possible and that the structure as it exists cannot be remedied in such a way to prevent it from becoming a nuisance, then the local government must establish by a preponderance of the evidence that the structure should be demolished.[251] Some jurisdictions appear more inclined to require remediation if the condition is something that is not dangerous, but merely an irritating or neglected property.[252]

In sum, reviewing courts are more inclined to treat remediation as a right rather than a privilege.[253] However, this may depend on the condition of the property and the extent to which a particular

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TEX., BUILDING AND STANDARDS COMMISSION REGULAR MEETING MINUTES 1 (Sept. 22, 2010), *available at* http://www.ci.austin.tx.us/edims/document.cfm?id=144494 (stating that the commission may order penalties, repairs, or an order to vacate).

250. Newton v. Town of Highland Park, 282 S.W.2d 266, 277 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.). Other jurisdictions have traditionally recognized this principle as well. *See* Nazworthy v. City of Sullivan, 55 Ill. App. 48, 52 (App. Ct. 1893) ("If the nuisance consisted of the use made of the structure, clearly the law would not justify the destruction of the building, but the cause of the offense should alone be removed."); Polsgrove v. Moss, 157 S.W. 1133, 1136 (Ky. 1913) (finding that if it is "practicable" to remove the nuisance without abating the property, the removal must be ordered initially); Welch v. Stowell, 2 Doug. 332, 341–42 (Mich. 1846) (arguing that demolition was "unnecessary" when other laws provided a means for removing the nuisance itself without demolishing the property completely).

251. West v. City of Borger, 309 S.W.2d 250, 253 (Tex. Civ. App.—Amarillo 1958, no writ).

252. *See generally* City of Safford v. Seale, No. 2 CA-CV 2008-0185, 2009 WL 3390172, at *3 (Ariz. Ct. App. Oct. 21, 2009) (requiring remediation before demolition in the case of cat litter that left a foul odor).

253. *See Buildings that are Menaces or Public Nuisances—Removal or Destruction, in* 7A MCQUILLIN MUN. CORP. § 24.557 (3d ed. 2011) ("Generally a municipality must, before destroying a building, give an owner . . . ample opportunity to demolish the building or to do what suffices to make it safe or healthy for use and occupancy."). However, the "exception to the rule requiring judicial determination is recognized with respect to something having the nature of a public emergency, threatening public calamity, and presenting an imminent and controlling exigency." City of Houston v. Lurie, 148 Tex. 391, 224 S.W.2d 871, 877 (1949) (quoting Stockwell v. State, 110 Tex. 550, 221 S.W. 932, 934 (1920)) (internal quotation marks omitted).

public nuisance affects the surrounding community.[254] It is clear that courts, even before *Stewart*, have disfavored commission decisions that issue an order for demolition without any kind of relief afforded to a property owner prior to the order.[255] This treatment is in congruity with the first *Eldridge* factor, which considers the gravity of potential loss to an individual.[256] Thus, ordering demolition without any kind of relief prior to the order is a harsh remedy and has due process implications associated with it.

A local government must only prove by a preponderance of the evidence that a nuisance could not have been remediated and that demolition was subsequently proper.[257] However, after *Stewart*, a property owner may introduce new evidence to show that remediation could have been ordered first and that demolition was therefore improper.[258] This will greatly increase the potential liability of local governments acting on administrative decisions ordering demolition. Thus, commissions may now be more inclined to ensure that a property owner has an opportunity to remedy the condition before a demolition order is issued.

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254. *See Lurie*, 224 S.W.2d at 877 (recognizing that a judicial determination will not be required when there is a public emergency, a public threat, or a controlling exigency); *Newton*, 282 S.W.2d at 277 (asserting that if a nuisance can be corrected, courts will refuse to order demolition); *see also Buildings that are Menaces or Public Nuisances—Removal or Destruction, in* 7A MCQUILLIN MUN. CORP. § 24.557 (3d ed. 2011) (stating that, unless there is a "great emergency," the owner of property "should be given a reasonable time to remove or repair a building before city authorities order it torn down or removed").

255. *See Lurie*, 224 S.W.2d at 877 (determining that if "measures can be taken to remove the dangerous conditions," the right to repair cannot be denied in an action to abate a nuisance from a structure which was otherwise lawfully constructed); *Newton*, 282 S.W.2d at 277 (holding that if the condition creating the nuisance can be corrected through repair, this must be done before an order for demolition is issued).

256. *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) ("[I]dentification of the specific dictates of due process generally requires consideration of . . . the private interest that will be affected by the official action . . . .").

257. West v. City of Borger, 309 S.W.2d 250, 253 (Tex. Civ. App.—Amarillo 1958, no writ).

258. *See* City of Dallas v. Stewart, 55 Tex. Sup. Ct. J. 271, 2012 WL 247966, at *9 (Jan. 27, 2012) (permitting de novo review of an administrative board's nuisance determination); W. Wendell Hall et al., *Hall's Standard of Review in Texas*, 42 ST. MARY'S L.J. 3, 72 (2010) (commenting that in a de novo review of an administrative decision, the reviewing court "may consider new evidence not presented before the agency").

G. *Neutral Decision Maker*

The neutrality of members of building and standards commissions has been questioned because the members of these commissions are appointed by local governments[259] and are essentially employees of these governments.[260] The local government, in turn, stands to benefit from these proceedings by demolishing property and then placing a lien on it for the demolition costs, thereby acquiring an interest in the property.[261] The United States Supreme Court has declared that in an administrative hearing, the right to a hearing before a neutral decision maker is essential.[262] At least one court has expressly extended disqualification standards to members of local administrative commissions acting in an adjudicative capacity.[263]

Judge Dennis from the Fifth Circuit has stated that "the Due Process Clauses require that, before a person is deprived of his real property by the government, he must be given notice and an opportunity for a meaningful hearing before a neutral magistrate."[264] This requirement is made to "ensure the requisite neutrality that must inform governmental decision making."[265] In disagreeing with the majority's decision in *Freeman v. City of*

259. *See* TEX. LOC. GOV'T CODE ANN. § 54.033(a) (West 2008) ("The governing body of the municipality may provide for the appointment of a building and standards commission to hear and determine cases concerning alleged violations of ordinances.").

260. *See* Elaine Wolff, *Kangaroo Court (Part I): Meet the City's New Extra-Constitutional Crime-Fighting Tool*, SAN ANTONIO CURRENT, Apr. 21, 2010, http://sacurrent.com/printStory.asp?id=71078 (questioning the impartiality of the San Antonio DSDB, which is comprised of city employees selected by the city manager).

261. LOC. GOV'T § 214.001(n) (West Supp. 2011) (providing that a city may assess expenses incurred in abating the nuisance on the property, which gives the city a lien against the property until a person with an interest in the legal title to the property reimburses the city).

262. Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

263. Tenn. Cable Television Ass'n v. Tenn. Pub. Serv. Comm'n, 844 S.W.2d 151, 164 (Tenn. Ct. App. 1992) (citing TENN. CODE ANN. § 4-5-302(a) (1991)).

264. Freeman v. City of Dallas, 242 F.3d 642, 666 (5th Cir. 2001) (Dennis, J., dissenting). The Supreme Court has previously used the "meaningful" standard as a smoke screen against statutory provisions for hearings that do not comport with minimum requirements of due process. *See* Fuentes v. Shevin, 407 U.S. 67, 80–82 (1972) (striking down a replevin statute that provided a hearing to property owners after property was repossessed).

265. *Freeman*, 242 F.3d at 666 (Dennis, J., dissenting) (citing United States v. James Daniel Good Real Prop., 510 U.S. 43, 48, 53–56 (1993)).

Dallas,[266] Judge Dennis questioned the neutrality of the Dallas URSB.[267] Judge Dennis argued that "[t]he City of Dallas has pecuniary interests in the outcome of such proceedings, e.g., justification for federal and state urban renewal grants[, and] enhancement of the municipal tax base by promoting the replacement of old buildings with new ones."[268] Accordingly, the United States Supreme Court has already noted that when a local government has a "direct pecuniary interest in the outcome of the proceeding," an increased level of scrutiny is warranted with regards to an individual's deprivation of due process rights, especially when post-order relief is to no avail of a property owner.[269] Similar sentiments were expressed by Judge Friendly, who argued that procedural safeguards should be added depending on the degree to which an administrative tribunal is removed from the particular agency it is adjudicating for.[270] Also, the Third Circuit has expressed that because certain procedural safeguards are commonly absent from administrative proceedings, the bias requirement should be applied with greater force.[271]

This issue is contentious, but to date there have been no cases where an administrative public nuisance decision was overturned due to the impartiality of the administrative commission. Again, the community environment and objectives of these hearings warrant that actual members of the community take part in the decision-making process of building and standards commissions. Commission members have far-reaching authority, which extends to improving and transforming entire communities.[272] As such, the extent to which commission members are associated with local governments through their appointment and other pecuniary

266. Freeman v. City of Dallas, 242 F.3d 642 (5th Cir. 2001).

267. *Id.* at 667 (Dennis, J., dissenting).

268. *Id.*

269. *James Daniel Good Real Prop.*, 510 U.S. at 56–57 (citing Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991)).

270. Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1278–79 (1975).

271. Ventura v. Shalala, 55 F.3d 900, 902 (3d Cir. 1995) (citing Hummel v. Heckler, 736 F.2d 91, 93 (3d Cir. 1984)).

272. *See* TEX. LOC. GOV'T CODE ANN. § 214.001 (West Supp. 2011) (authorizing a municipality to regulate substandard buildings).

interests is disconcerting.[273] A property owner has a compelling argument that because of the aforementioned association, there are inherent risks preventing commissions from making equitable and impartial determinations.[274] This argument strengthens a property owner's claim for increased procedural due process rights under the second *Eldridge* factor.[275]

However, there remains the possibility that reviewing courts will be hesitant to impose disqualification standards on somewhat tenuous grounds, such as improvement of the tax base, urban renewal grants, and employment conflicts. Every building and standards commission member could be questioned, leading to an increase in appeals, thereby placing administrative burdens on local and state governments.[276] In sum, the fact that disqualifying members of building and standards commissions may lead to a complete overhaul of the way public nuisances are enforced by local public actors may cause reviewing courts to be hesitant to issue rulings of disqualification.

H. *Claims for Relief*

This section examines various claims a property owner may bring for damages as a result of a wrongful order of a building and

273. *See* Elaine Wolff, *Kangaroo Court (Part I): Meet the City's New Extra-Constitutional Crime-Fighting Tool*, SAN ANTONIO CURRENT, Apr. 21, 2010, http://sacurrent.com/printStory.asp?id=71078 (commenting on the close association between members of the San Antonio DSDB and other members of the local government).

274. In San Antonio, Texas, an attorney that often acts as legal counsel for the city at DSDB meetings also works with the Dangerous Assessment Response Team (DART), a group established under the city attorney's office to target properties that are associated with high crime rates and submit them to court or the DSDB. News Release, City of San Antonio, Tex., New Enforcement Unit Targets Properties with Habitual Criminal and Code Violations (Dec. 19, 2007), *available at* http://www.sanantonio.gov/news/News Releases/nrDART.asp.

275. *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (finding that "the risk of an erroneous deprivation of [an individual's private] interest through the procedures used" by the government, and any probative value of additional procedural safeguards must be considered for the purposes of due process).

276. *Cf. id.* (requiring courts to consider "the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that [an] additional or substitute procedural requirement would entail[,]" in examining due process); Mohilef v. Janovici, 58 Cal. Rptr. 2d 721, 741 (Ct. App. 1996) (determining that the fiscal and administrative burdens imposed by requiring cross-examination in nuisance abatement proceedings would outweigh the probative value of such a requirement).

standards commission. To establish a takings claim, a property owner must generally prove that the taking of property was done for a public use by an intentional act of the government.[277] Similarly, a property owner may bring a claim for inverse condemnation when property is damaged, taken, or destroyed for public use without proper proceedings in a condemnation action or without due process.[278] Ordinarily, relief is limited because a property owner only has ownership rights, which are subject to a local government's police power, and a local government may abate public nuisances pursuant to this power without having to compensate property owners.[279] However, the Supreme Court has previously ruled that if regulation by a local government in accordance with its police power is done impermissibly, a resulting order amounting to the diminution of property "will be recognized as a taking."[280] Thus, when an ordinance is declared to be unconstitutional insofar as it does not comply with due process requirements, and property is demolished or taken pursuant to this authority, a property owner may rightfully bring a takings claim.[281]

In a then-questionable holding, the Texas Fifth Court of Appeals, in *City of Dallas v. Stewart*,[282] greatly expanded the scope of takings claims of property owners subject to public nuisance demolition orders.[283] The court held that a local government may defend a takings claim from a public nuisance order only by showing that property is a "nuisance *on the day it was demolished*."[284] The effect of this decision is to grant

277. Patel v. City of Everman, 179 S.W.3d 1, 17 (Tex. App.—Tyler 2004, pet. denied).

278. City of Abilene v. Burk Royalty Co., 470 S.W.2d 643, 646 (Tex. 1971); Allen v. City of Texas City, 775 S.W.2d 863, 864 (Tex. App.—Houston [1st Dist.] 1989, writ denied); *see also* City of Dallas v. Stewart, 55 Tex. Sup. Ct. J. 271, 2012 WL 247966, at *3 (Jan. 27, 2012) (opening the door for inverse condemnation actions whenever "the government takes property without first following eminent domain procedures").

279. City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 804 (Tex. 1984); City of Pharr v. Pena, 853 S.W.2d 56, 60 (Tex. App.—Corpus Christi 1993, writ denied).

280. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

281. *Id.* at 415–16.

282. City of Dallas v. Stewart, No. 05-07-01244-CV, 2008 WL 5177168 (Tex App.—Dallas Dec. 11, 2008) (mem. op.), *aff'd*, 2012 WL 247966.

283. *See id.* at *2 (requiring that the city prove the property was a nuisance when the property was demolished).

284. *Id.*

property owners relief when a local government delays demolishing property, by enabling repairs to be made to the extent that the property is no longer a nuisance.[285] The court's ruling is problematic, however, because one of the cases *Stewart* relies on, *City of Houston v. Crabb*,[286] based its ruling on a "public emergency" taking, which is distinct from a demolition based on a public nuisance.[287] Public emergency takings have been held to be, if anything, a distinct kind of nuisance, subject to different requirements than an ordinary public nuisance.[288] Accordingly, a

285. *Id.* (holding that because "[t]he Board made its nuisance finding over a year before [the] house was actually demolished[,] . . . the fact issue before the Board was not identical to the fact issue before the trial court on [the property owner's] takings claim" and that the property owner was entitled to relief on her takings claim).

286. City of Houston v. Crabb, 905 S.W.2d 669 (Tex. App.—Houston [14th Dist.] 1995, no writ).

287. *See id.* at 674 ("In other words, [property owners] proved the City demolished the building 'because of real or supposed public emergency.' The City's burden was to 'defend its actions by proof of a great public necessity.' In essence, the City had to show that the building was a nuisance on the day it was demolished, which it failed to do." (citations omitted)). The *Stewart* court also relied upon *Patel v. City of Everman*, which stated that "the governmental entity has to show that the property destroyed was a nuisance on the day it was destroyed." 179 S.W.3d 1, 11 (Tex. App.—Tyler 2004, pet denied) (citing *Crabb*, 905 S.W.2d at 675); *see Stewart*, 2008 WL 5177168, at *1.

288. *See* City of Dallas v. Stewart, 55 Tex. Sup. Ct. J. 271, 2012 WL 247966, at *19 (Jan. 27, 2012) (Johnson, J., dissenting) (arguing that the majority's reliance on *Steele* is misplaced, because *Steele* concerned situations involving the "doctrine of great public necessity" and is therefore "different from situations involving destruction of property following proceedings pursuant to statutes and ordinances requiring advance notice, a hearing with the opportunity to challenge the public nuisance determination before destruction, and review by a court"); Crossman v. City of Galveston, 112 Tex. 303, 247 S.W. 810, 814 (1923) (declaring that during a public emergency, summary abatement by a city council is proper, when ordinarily this would not be the case with regards to other forms of nuisances that do not concern "a fire, or raging pestilence, or other threatening public calamity, presenting an imminent and controlling exigency, before which, of necessity, all private rights must immediately give way"). Courts in other jurisdictions also differentiate between takings based on a public emergency. *See* Potashnick Truck Serv. Inc. v. City of Sikeston, 173 S.W.2d 96, 100 (Mo. 1943) (distinguishing between nuisances derived at common law or from statutory construction with other nuisances that are "noxious, harmful[,] or prejudicial to the public health, comfort[,] or interest in populous centers"); State v. Keller, 189 N.W. 374, 376 (Neb. 1922) (finding that an exception is made with regard to the abatement of public nuisances if they have the "nature of a public emergency" and present "an imminent and controlling exigency before which, of necessity, all private rights must immediately give way" (quoting Stockwell v. State, 110 Tex. 550, 221 S.W. 932, 934 (1920))).

public emergency taking has long warranted fewer due process requirements.[289]

However, the Texas Supreme Court affirmed the decision of the Texas Court of Appeals in *Stewart*, basing its decision on the close association of public nuisance abatements and constitutional takings.[290] In making this comparison, the court declined to hold that commission decisions are res judicata of whether property is a nuisance on the day the property is demolished.[291] Therefore, a local government must show that property is a nuisance on the day it was demolished in order to survive a takings claim or inverse condemnation action brought by a property owner when there is a delay between the order and the demolition.[292] The *Stewart* court did not specifically address a bright-line rule as to the length of an improper delay. However, the facts of *Stewart* are instructive: the Dallas URSB initially entered an order in September 2001, but due to appeals and other delays, the property was not demolished until early November 2002.[293]

Perhaps the most questionable part of the five-person majority decision in *Stewart*, however, is the close association of public nuisance abatements and other kinds of constitutional takings.[294] The majority stated that "[a] nuisance determination . . . cannot be characterized as somehow apart from the takings claim, because the only sense in which such a determination is significant—its only meaning—is that it gives the government the authority to take and destroy a person's property *without compensation*."[295]

289. *See* Vill. of Zumbrota v. Johnson, 161 N.W.2d 626, 630 (Minn. 1968) (noting the existence of "an emergency situation" does not require the commonplace due process rights typically found in hearings regarding public nuisances); Bernard Schwartz, *A Decade of Administrative Law: 1987–1996*, 32 TULSA L.J. 493, 521 (1997) (stating that the emergency exception does not guarantee an individual a right to a hearing when the suspended right is necessary for other interests).

290. *Stewart*, 2012 WL 247966, at *4.

291. *Id.* at *9.

292. A municipal agency's nuisance determination does not preclude a property owner from bringing a takings claim, which involves legal and factual determinations that are outside the authority of such municipal agencies. *Id.* at *11–12. Furthermore, to defend against a takings claim, a city must establish "that the building destroyed was a nuisance on the day it was demolished." *Stewart*, 2008 WL 5177168, at *1.

293. *Stewart*, 2012 WL 247966, at *1.

294. *Id.* at *9 (comparing a nuisance determination to a "value determination made by the board of commissioners in an eminent domain case").

295. *Id.*

However, the dissenting justices had other ideas about the association of takings claims and public nuisance abatements. Justice Guzman argued that "proper abatement of a public nuisance does not constitute a taking," as determined by the United States Supreme Court.[296] Justice Guzman relied on Supreme Court precedent from over one hundred years ago, which states that a government actor's public nuisance abatement "is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance is only abated; in the other, unoffending property is taken away from an innocent owner."[297]

This language is very important because it differentiates property being held subject to the exercise of police power, on one hand, and "unoffending" property being improperly interfered against without due process, on the other.[298] In a dissenting opinion, Justice Guzman stated, "Due process distinguishes proper abatement of a nuisance from the improper deprivation of property."[299] Under this view, due process, takings claims, and public nuisance abatements are distinct, separate concepts.[300] Applying procedural due process protections to public nuisance abatements by comparing them with constitutional takings is problematic. There is no clear intent by the drafters of either the federal or state constitutions to include public nuisance abatements within the ambit of constitutional takings because a local government's regulatory police power existed at common law

296. *Id.* at *22 (Guzman, J., dissenting) (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992); Samuels v. McCurdy, 267 U.S. 188, 196 (1925)).

297. *Id.* (citing *Samuels*, 267 U.S. at 196).

298. Under a local government's police power, it "commits no taking when it abates what is, in fact, a public nuisance." *Id.* at *5 (majority opinion) (citing City of Texarkana v. Reagan, 112 Tex. 317, 247 S.W. 816, 817 (1923)). On the other hand, a property owner can commence an action "seeking compensation for the government's taking or damaging of his or her property through means other than formal condemnation." *Id.* at *3 (citing City of Houston v. Trail Enters., Inc., 300 S.W.3d 736, 736 (Tex. 2009) (per curiam)).

299. *Id.* at *22 (Guzman, J., dissenting) (citing *Samuels*, 267 U.S. at 196; Bielecki v. City of Port Arthur, 12 S.W.2d 976, 978 (Tex. 1929); Crossman v. City of Galveston, 112 Tex. 303, 247 S.W. 810, 813 (1923); Stockwell v. State, 110 Tex. 550, 221 S.W. 932, 935 (1920)).

300. *But see id.* at *10 (majority opinion) (arguing that the distinction between "police power and takings is illusory and requires a careful analysis of the facts . . . in each case of this kind" (quoting City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 804 (Tex. 1984)) (internal quotation marks omitted)).

and pre-existed the adoption of both constitutions.[301] However, the Texas Supreme Court has remarked that "[t]he police power is subordinate to the Constitution."[302]

All of the due process rights guaranteed under the Fourteenth Amendment to the United States Constitution are enforced under 42 U.S.C. § 1983.[303] The principal issue under this statute is whether due process claims may properly be filed against public officials, as they are often shielded from civil liability through qualified immunity.[304] In fact, the Supreme Court has granted quasi-judicial officials absolute immunity with regard to claims for liability under the Fourteenth Amendment.[305] Accordingly, individual members of the Dallas URSB have been shielded from liability under federal due process claims because the URSB acts as a quasi-judicial body.[306]

However, some types of municipal officials may still be held personally liable under § 1983 pursuant to the theory of "supervisory liability."[307] In contrast, a municipality can only be

301. *See* Fertilizing Co. v. Vill. of Hyde Park, 97 U.S. 659, 667 (1878) (stating that the regulatory police power "belonged to the States when the [f]ederal Constitution was adopted" and one of its ordinary functions was "[t]o regulate and abate nuisances"); *see also* Harvey v. De Woody, 18 Ark. 252, 259 (1856) (deciding, based on precedent, that a local government has authority to abate public nuisances and that the legislative police power "clothes the mayor and councilman . . . with unquestionable legislative power and perogatives"); Polsgrove v. Moss, 157 S.W. 1133, 1136 (Ky. 1913) (stating that the common law guides public nuisance determinations). The Texas Supreme Court in *Stewart* re-affirmed, in one sense, that the government does not commit a taking when it abates a public nuisance, and thus has severed nuisance abatements from constitutional takings. *Stewart*, 2012 WL 247966, at *5. Although the Texas Constitution includes takings that result from "urban blight" within the state's Takings Clause, the United States Supreme Court has denied property owners compensation when their property is deemed a nuisance according to state law. TEX. CONST. art. I, § 17(a)(2); *Lucas*, 505 U.S. at 1029.

302. City of Houston v. Lurie, 148 Tex. 391, 224 S.W.2d 871, 874 (1949).

303. 42 U.S.C § 1983 (2006); *see also* Matthias v. Bingley, 906 F.2d 1047, 1051 (5th Cir. 1990) (stating that all rights guaranteed under the Fourteenth Amendment are protected by § 1983).

304. Swann v. City of Dallas, 922 F. Supp. 1184, 1196 (N.D. Tex. 1996) (recognizing that "qualified immunity protects public officials . . . from civil liability"), *aff'd*, 131 F.3d 140 (5th Cir. 1997) (per curiam).

305. *See* Butz v. Economou, 438 U.S. 478, 511–12 (1978) (discussing the need to extend absolute immunity to quasi-judicial officials for liability claims).

306. *Swann*, 922 F. Supp. at 1195.

307. *See id.* at 1192, 1205–07 (recognizing that individuals can be held liable for deliberate indifference under the theory of supervisory liability). The district court determined that a municipal official may be individually liable based on prior Fifth Circuit

liable under § 1983 if the local government codified a regulation or ordinance that caused a plaintiff to be denied some constitutional right.[308] A federal district court has ruled that a local government may also be held liable under a "deliberate indifference standard" when the equivalent of a building and standards commission violates a property owner's due process rights.[309] Furthermore, the same federal court declined to extend immunity to the board administrator who was "objectively unreasonable" when bringing claims against property, as well as to building inspectors who entered property without the proper authority.[310] The measure of damages granted to a property owner depends on the facts of each case and the condition of the property.[311]

Despite federal courts' grant of immunity in federal due process claims, the *Stewart* court suggested it would not extend immunity to local governments improperly abating public nuisances when an aggrieved property owner brings an inverse condemnation action.[312] Again, *Stewart* incorporated improper nuisance abatements with takings under the Texas Constitution as a basis

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case law. *Id.* at 1206. The court explained that a municipality is liable when the municipality's conduct is deliberately indifferent to an individual's constitutional rights. *Id.* at 1205. The court elaborated that liability can be extended to some individuals stating, "we see no principled reason why an individual to whom the municipality has delegated responsibility to directly supervise [an] employee should not be held liable under the same standard." *Id.* at 1206 (internal quotation marks omitted) (citing Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 453 (5th Cir. 1994)).

308. *See* City of St. Louis v. Praprotnik, 485 U.S. 112, 127–28 (1988) (holding that the city is not liable under § 1983 unless it can be shown that the city adopted an unconstitutional municipal policy); City of Lubbock v. Corbin, 942 S.W.2d 14, 20 (Tex. App.—Amarillo 1996, writ denied) (stating that in order to hold a city liable under § 1983, it must be shown that an official policy or custom of the municipality's final policymaker causes the plaintiff to be subjected to a denial of a constitutional right).

309. *See Swann*, 922 F. Supp. at 1205–06 (discussing the deliberate indifference standard and extending it to supervisory liability).

310. *See id.* at 1204 (holding that the defendants were not entitled to qualified immunity because, by not obtaining permission from plaintiff to enter the property, defendants did not act objectively reasonable).

311. Miles v. District of Columbia, 510 F.2d 188, 195 (D.C. Cir. 1975).

312. City of Dallas v. Stewart, 55 Tex. Sup. Ct. J. 271, 2012 WL 247966, at *4 (Jan. 27, 2012) ("[G]overnmental immunity does not shield the City of Houston [against a claim for destruction of property]. *The Constitution itself is the authorization for compensation for the destruction of property and is a waiver of governmental immunity for the taking, damaging[,] or destruction of property for public use.*" (quoting Steele v. City of Houston, 603 S.W.2d 786, 791 (Tex. 1980))).

for not extending immunity.[313] In doing so, the court relied on language from a previous Texas Supreme Court decision, *Steele v. City of Houston*,[314] which held that compensation is required in a public emergency taking.[315] In *Steele*, the court stated that "[t]he Constitution itself is the authorization for compensation for the destruction of property and is a waiver of governmental immunity for the taking, damaging[,] or destruction of property for public use."[316] Thus, because of this close association with takings claims and reliance on the aforementioned language, it is doubtful local governments will enjoy immunity in Texas state court actions after *Stewart*.[317]

The Texas Constitution states: "No citizen of this State shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised, except by the due course of the law of the land."[318] Courts have denied causes of action for damages under the "due course of the law" language in this section.[319] However, the "due course of law" provision and the Due Process Clause are, for all purposes, synonymous, and the same relief is afforded under the violation of rights claim referenced above.[320]

In sum, a cause of action for inverse condemnation under a state constitutional takings claim represents the widest scope of relief to which property owners are entitled.[321] Although immunity

313. *Id.*

314. Steele v. City of Houston, 603 S.W.2d 786 (Tex. 1980).

315. *See id.* at 793 (holding that innocent third-parties are constitutionally entitled to compensation for state destruction to their property).

316. *Id.* at 791.

317. *See Stewart*, 2012 WL 247966, at *28 (Johnson, J., dissenting) ("The Court's decision opens the door to a host of takings challenges to agency determinations [regarding public nuisance abatements and other claims] of every sort, and in every such challenge a right to trial de novo will be claimed.").

318. TEX. CONST. art. I, § 19.

319. Kinnison v. City of San Antonio, 699 F. Supp. 2d 881, 891 (W.D. Tex. 2010); *see also* City of Beaumont v. Bouillion, 896 S.W.2d 143, 148–49 (Tex. 1995) (holding that because consequences are expressly listed for unconstitutional laws, there is no cause of action in the Texas Bill of Rights for damages); Patel v. City of Everman, 179 S.W.3d 1, 14 (Tex. App.—Tyler 2004, pet. denied) (denying plaintiff's claim for damages and declaring that the claim is "unavailable").

320. *See* Univ. of Tex. Med. Sch. at Hous. v. Than, 901 S.W.2d 926, 929–32 (Tex. 1995) (equating a "due course of law" claim with due process and describing the former language to be "without meaningful distinction").

321. *See Steele*, 603 S.W.2d at 791 (requiring relief under the United States Constitution for the "taking, damaging[,] or destruction of property"); John T. Cabaniss,

shields individual commission members from liability in federal due process claims, a local government may nevertheless be subjected to claims for relief.[322] Criticisms have been expressed that so long as members of commissions regulating public nuisances can avoid punitive damages for their mistakes, they will continue making them and will continue demolishing properties at an alarming rate.[323] However, these criticisms will likely be alleviated by the wide net of judicial review that *Stewart* has created,[324] as well as the increased scope of liability that local governments are now subjected to when property owners file inverse condemnation claims.[325]

V. ANALYSIS

The United States Supreme Court has held that "[a]ny significant taking of property by the State is within the purview of

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Comment, *Inverse Condemnation in Texas—Exploring the Serbonian Bog*, 44 TEX. L. REV. 1584, 1587 (1966) (stating that "[i]nverse condemnation . . . is a practical, direct remedy against the state based on a constitutional provision that is on a level equal to the constitutional provision prohibiting suits against the state without its consent . . . [and when inverse condemnation is a recognized remedy in a jurisdiction,] the procedures designed to bypass sovereign immunity and the complexity they entail [can] be avoided"); *cf. Kinnison*, 699 F. Supp. 2d at 891 (denying that the Texas Constitution recognizes a cause of action for damages under the "due course of law" clause).

322. *See* City of St. Louis v. Praprotnik, 485 U.S. 112, 127–28 (1988) (announcing that liability can arise against a local government when such government adopts an unconstitutional municipal ordinance); Swann v. City of Dallas, 922 F. Supp. 1184, 1205–07 (1996) (holding certain individuals not liable because they were found to have either absolute immunity or qualified immunity but nonetheless extending immunity to the municipality).

323. *See* Elaine Wolff, *A Dallas Suit Challenges Nuisance Law, Too*, SAN ANTONIO CURRENT (Apr. 9, 2010), http://www.sacurrent.com/blog/queblog.asp?perm=70256 (arguing that, without the consequence of punitive damages, cities will continue to demolish high numbers of private properties); Elaine Wolff, *DSDB Says Journalism=Solicitation. City Attorney Sets the Record Straight, Queblog*, SAN ANTONIO CURRENT (Apr. 13, 2010, 5:50 PM), http://www.sacurrent.com/blog/queblog.asp?perm=70267 (arguing that cities need stronger deterrents so that they cease demolishing private properties at such an alarming rate).

324. *See* City of Dallas v. Stewart, 55 Tex. Sup. Ct. J. 271, 2012 WL 247966, at *4 (Jan. 27, 2012) (stating that "[a]gency findings in eminent domain cases are subject to de novo trial court review, and inverse condemnation plaintiffs bring their cases in the same manner as any other civil case").

325. *Praprotnik*, 485 U.S. at 127–28 (acknowledging the possibility of liability for local governments).

the Due Process Clause."[326] At least one federal judge has compared the role of a quasi-judicial commission to that of a judge, and has ruled that its "functions are judicial in nature and its members' role is comparable to that of a judge."[327] Prior to *Stewart*, many courts expressly declined to give administrative hearings the kind of procedural due process that is ordinarily required in judicial hearings, although they did require "minimum" standards to be set.[328] Judge Learned Hand once commented that "due process of law does not mean infallible process of law."[329] While Texas courts seldom enumerate specific examples of what "minimum requirements of due process" are, they have held that "the ultimate test of due process of law in an administrative hearing is the presence or absence of rudiments of fair play long known to our law."[330]

Beyond the basic rights guaranteed by statute,[331] courts have not interjected due process requirements into the rulemaking affairs of local administrative commissions regulating public nuisances.[332] *Perkins v. City of San Antonio*[333] illustrates this point very well. Although the Texas Fourth Court of Appeals held that insufficient notice was given before a demolition order was issued, the court merely referenced in a footnote that orders of building and standards commissions are reviewed for due process.[334] The undefined vagueness of "rudiments of fair play"

326. Fuentes v. Shevin, 407 U.S. 67, 86 (1972).

327. *Swann*, 922 F. Supp. at 1193.

328. *See* Goldberg v. Kelly, 397 U.S. 254, 267 (1970) (expressing reluctance to impose any procedural requirements that go "beyond those demanded by rudimentary due process"); J.B. Adver., Inc. v. Sign Bd. of Appeals, 883 S.W.2d 443, 448–49 (Tex. App.—Eastland 1994, writ denied) (stating that "administrative proceedings . . . must meet the minimum requirements of due process").

329. Schechtman v. Foster, 172 F.2d 339, 341 (2d Cir. 1949).

330. *J.B. Adver.*, 883 S.W.2d at 449 (quoting State v. Crank, 666 S.W.2d 91, 94 (Tex. 1984)) (internal quotation marks omitted).

331. *See* U.S. CONST. amend XIV, § 1 (guaranteeing citizens due process of law).

332. *See* Perkins v. City of San Antonio, 293 S.W.3d 650, 655 (Tex. App.—San Antonio 2009, no pet.) (relying on a procedural deficiency to reverse the trial court determination instead of making a due process inquiry).

333. Perkins v. City of San Antonio, 293 S.W.3d 650 (Tex. App.—San Antonio 2009, no pet.).

334. *See id.* at 654 n.2 (noting that a reviewing court is authorized to determine whether the procedures used in a hearing before a building and standards commission satisfied due process).

and the footnote in *Perkins* suggest that issues of due process are not given much consideration or are altogether ignored. This is further demonstrated by the wide latitude Texas courts have also given local rulemaking administrative tribunals, which is evidenced by their failure to issue specific rulings on whether local administrative hearings comport with due process.[335] Indeed, prior to *Stewart*, there was an underlying acknowledgment in adjudication of due process challenges that deference will be given to the "good-faith judgments" of administrative rulemaking authorities.[336] Many courts would only extend "rudiments of fair play" to encompass the essentials of due process—that an individual be given notice of the charges against him and an opportunity to defend himself against those charges.[337]

There are many possible reasons for this treatment by reviewing courts. First, some judges believed adjudication of these issues was a legislative task not to be interfered with by the courts.[338] Reviewing courts were hesitant to second guess legislatures and administrative commissions because those governmental entities have a better understanding of how to balance costs and benefits when establishing rules for administrative proceedings.[339] Second, courts suggested that formal judicial hearings were not the best method to decide on an issue or to present one's case.[340]

335. *See* Murphy v. Rowland, 609 S.W.2d 292, 296 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (holding that notice requirements and evidentiary rights in termination proceedings "adequately assured, rather than deprived . . . due process of law").

336. Mohilef v. Janovici, 58 Cal. Rptr. 2d 721, 732 (Ct. App. 1996) (quoting Mathews v. Eldridge, 424 U.S. 319, 348–49 (1976)).

337. *See* Samuels v. Meriwether, 94 F.3d 1163, 1167 (8th Cir. 1996) (determining that property owners were given sufficient procedural due process protections after being provided notice demanding remediation, a hearing, and subsequent inspections, which indicated that the property owner failed to meet remediation requirements); *see also Mohilef*, 58 Cal. Rptr. 2d at 732 ("The essence of due process is the requirement that a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." (alteration in original) (quoting *Eldridge*, 424 U.S. at 348–49) (internal quotation marks omitted)).

338. *See, e.g.*, *Mohilef*, 58 Cal. Rptr. 2d at 732 (holding that courts should only second-guess a legislative decision when such decision was made in bad faith or with disregard for the implications of such enactment).

339. *See id.* ("Lawyers and judges have a systematic tendency to overestimate the benefits of trial-type procedures and to underestimate the costs of those procedures." (citation omitted) (internal quotation marks omitted)).

340. *See Eldridge*, 424 U.S. at 348 (arguing that the "judicial model" of presenting

Stewart completely changed Texas due process jurisprudence by requiring de novo review of commission orders abating public nuisances.[341] In *Stewart*, the Texas Supreme Court held that because nuisance determinations are *constitutional* issues and because administrative commissions are not competent to handle these kinds of questions, judicial proceedings are the *only* proper method by which to make these determinations.[342]

Thanks to *Stewart*, procedural due process rights involving public nuisance abatements are now much greater than what is facially provided by statute.[343] The shock expressed by citizens with regard to due process shortcuts, however, is not without merit.[344] First, appointed counsel is unlikely to be provided to indigents appearing before building and standards commissions due to the extensive costs and the potential for contentious effects on hearings,[345] even though counsel would likely facilitate due process protections in some significant respects.[346] Additionally, because the neutrality of building and standards commission members has been questioned, a property owner may be hard-pressed to seek a reversal.[347] Further, the right of cross-examination, while being required in some administrative

evidence is not always the most effective way of making decisions).

341. City of Dallas v. Stewart, 55 Tex. Sup. Ct. J. 271, 2012 WL 247966, at *2–3 (Jan. 27, 2012).

342. *See id.* at *11–12 (emphasis added) (opining that "legal-factual determinations are outside the competence of administrative agencies" and that "the power of constitutional construction is inherent in, and exclusive to, the judiciary").

343. *Compare id.* at *2–3 (providing for de novo review of takings claims related to demolition of an alleged nuisance), *with* TEX. LOC. GOV'T CODE ANN. § 214.0012(f) (West 2008) (ordering for appeal of an administrative agency decision to be reviewed under the substantial evidence standard of review).

344. *See supra* Part I.

345. *Cf.* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 28 (1981) (acknowledging that, even in suits to terminate parental rights, the government has a legitimate interest in not appointing counsel because of costs and the potential for lengthened proceedings).

346. *See* Goldberg v. Kelly, 397 U.S. 254, 270 (1970) (explaining how counsel can help present the factual issues and safeguard the recipient's interests).

347. *See* Elaine Wolff, *Kangaroo Court (Part I): Meet the City's New Extra-Constitutional Crime-Fighting Tool*, SAN ANTONIO CURRENT, Apr. 21, 2010, http://sacurrent.com/printStory.asp?id=71078 (questioning the board's impartiality by comparing the board members to a judge who should have recused himself after a court determined he had a "direct, personal, substantial, pecuniary interest" in the case). In addition to commission neutrality being questioned, the Texas Supreme Court has stated that "[a]ccountability is especially weak with regard to municipal-level agencies." *Stewart*, 2012 WL 247966, at *8.

hearings, was held by at least one jurisdiction not to be essential to due process in local administrative hearings regulating public nuisances.[348] Even the opportunity for remediation, which has received favorable treatment by some courts,[349] is limited by an adversarial, governmental opponent with unlimited resources that impatiently wants to see nuisance determinations move along without additional delays.[350] This seems especially true after *Stewart* because delays may now invite an inverse condemnation proceeding that challenges whether property was a nuisance on the day it was demolished.[351]

Although *Stewart* greatly expanded the right to judicial review for property owners seeking to challenge decisions of administrative commissions, limitations are inherent in this right as

348. *See* Mohilef v. Janovici, 58 Cal. Rptr. 2d 721, 740 (Ct. App. 1997) (ruling that statements given at administrative hearings are informal and that cross-examination is inappropriate for such hearings).

349. *See* City of Houston v. Lurie, 148 Tex. 391, 224 S.W.2d 871, 877 (1949) (holding that the right to repair cannot be denied in an action to abate a nuisance when a dangerous condition can be removed); Newton v. Town of Highland Park, 282 S.W.2d 266, 277 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.) (requiring remediation before demolition when the condition creating the nuisance can be repaired).

350. *Cf. Lassiter*, 452 U.S. at 28 (asserting that the government has an interest in avoiding lengthy proceedings in parental termination matters); *id.* at 46 (Blackmun, J., dissenting) (noting the insurmountable task of an indigent party facing a state "that commands great . . . prosecutorial resources").

351. In *Stewart*, the plaintiff appealed the board's nuisance determination to the district court prior to the scheduled demolition date. *Stewart*, 2012 WL 247966, at *1. This appeal, however, did not stay the scheduled demolition. *Id.* Consequently, the plaintiff's house was demolished prior to the district court's decision on appeal. *Id.* After the plaintiff's home was demolished, she "amended her complaint to include a due process claim and a claim for an unconstitutional taking." *Id.* The district court then severed the plaintiff's claims and reviewed the board's nuisance determination under substantial evidence review but applied de novo review to the constitutional claims. *Id.* Because the home was demolished prior to judicial review of the board's determination, the plaintiff's takings claim became an inverse condemnation proceeding. *See id.* at *3 (summarizing the inverse condemnation as "actions commenced by the landowner seeking compensation for the government's taking or damaging of his or her property"). However, "the government commits no taking when it abates what is, in fact, a public nuisance." *Id.* at *5. If a de novo judicial determination that the structure is a nuisance was made before the demolition, the plaintiff would have fewer options for recourse post-demolition. *Cf. id.* at *4 ("That [takings] claim was made *under the authority of the Constitution* and was not grounded upon proof of either tort or nuisance." (quoting Steele v. City of Houston, 603 S.W.2d 786, 791 (Tex. 1980))). The opportunity to bring a new inverse condemnation claim is eliminated because there was no taking. *See id.* at *9 ("In a takings case, a nuisance finding generally precludes compensation for the government's destruction of property.").

well.[352] It is unclear how property owners who do not have the means to otherwise upkeep their property will be able to hire attorneys to represent them in court to challenge a nuisance finding.[353] Even if property owners have the means to hire an attorney, it is doubtful that many attorneys are well-informed about nuisance law because appeals in years past have been limited due to the deference afforded to commission determinations, which was created in large part by the substantial evidence standard of review.

Due to the limited rights ultimately afforded to individuals, courts should be cognizant of the severe consequences of losing one's property.[354] One commentator has argued that because local officials often seek to utilize public nuisance hearings to avoid the higher burden of proof and other harsh consequences of criminal proceedings, the procedural safeguards afforded in criminal law should be granted to an individual in nuisance hearings.[355] While the proposals in the following section advocate for increased due process protections, they do not amount to a complete overhaul of the system currently in place. Nor do the suggestions disregard governmental interests, as these should be considered in accordance with the third factor of *Eldridge*.[356]

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352. *See* Bryan M. Seiler, Note, *Moving from "Broken Windows" to Healthy Neighborhood Policy: Reforming Urban Nuisance Law in Public and Private Sectors*, 92 MINN. L. REV. 883, 901 (2008) (explaining how tenants in nuisance challenges rarely have the resources to litigate, and lack financial incentive and resources for the costs of an extensive appeal).

353. *Cf. Lassiter*, 452 U.S. at 30 (acknowledging that parents thrust into parental rights termination proceedings often have "little education" and are forced into a "disorienting situation").

354. *See* Denise Mcvea, *Razing Hopes (Part I): Thousands of People in Dallas Need a Cheap Place to Live. So Why Is the City Destroying Homes that Could be Saved?*, DALL. OBSERVER, Nov. 2, 1995, http://www.dallasobserver.com/1995-11-02/news/razing-hopes-part-i/ (discussing the limited avenues that a homeowner may pursue if he finds his property to be the subject of a demolition order).

355. *See* Bryan M. Seiler, Note, *Moving from "Broken Windows" to Healthy Neighborhood Policy: Reforming Urban Nuisance Law in Public and Private Sectors*, 92 MINN. L. REV. 883, 893–99 (2008) (explaining how civil nuisance actions are often brought by government officials as a way to avoid the higher standards of proof inherent in criminal law and, thus, concluding that the same safeguards applied in criminal law cases should similarly be applied in public nuisance actions).

356. *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (deciding that the government's interest should be weighed as the third element in determining whether due process is constitutionally sufficient).

VI. PROPOSED AMENDMENTS

This part proposes changes to the current procedures of local administrative proceedings regulating public nuisances, taking into account the three-fold balancing approach set forth in *Eldridge*.[357] Any benefits of additional procedural safeguards must be balanced against the burden of the government in providing these safeguards.[358] If the added governmental burden is minimal, then this will weigh in favor of enacting the safeguard, especially when the individual's interest is significant.[359] Additional procedural safeguards are adopted and customized according to the facts and circumstances of the case, the nature of the individual's right, and the setting in which the deprivation of this right took place.[360]

Although the current system is not a perfect one, it does provide a hearing, diligent notice, and a favorable standard of judicial review.[361] Judge Friendly noted that "with the vast increase in the number and types of hearings required in all areas where the government and the individual interact, common sense dictates that we must do with less than full trial-type hearings even on what are clearly adjudicative issues."[362]

However, improvements can be made while still heeding Judge Friendly's advice. For instance, current public nuisance

357. *See id.* (providing that a balancing approach should be used when determining whether an individual's due process rights should be considered during an administrative hearing).

358. *See* Univ. of Tex. Med. Sch. at Hous. v. Than, 901 S.W.2d 926, 932 (Tex. 1995) (applying a balancing test that weighed the competing interests of the individual's right to due process against the burdens imposed upon the state institution).

359. *See id.* (holding that an individual's due process rights should be preserved when an individual's loss is significant compared to the burdens imposed on the other party).

360. *See id.* at 930 (discussing due process as "measured by a flexible standard that depends on the practical requirements of the circumstances" and expressing concern about those outside the academic environment dictating the exact process due within university dismissals (citation omitted)).

361. *See* City of Dallas v. Stewart, 55 Tex. Sup. Ct. J. 271, 2012 WL 247966, at *2, *12 (Jan. 27, 2012) (recognizing that notice and a hearing are required before ordering a demolition, and holding that a nuisance determination must be reviewed de novo); *see also* Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA L. REV. 1267, 1279–80 (1975) (discussing the need for notice in order to ensure a fair trial among an unbiased tribunal); *cf.* Wolff v. McDonnell, 418 U.S. 539, 557–58, 563–64 (1974) (holding that a hearing, coupled with adequate notice, is always required before a person is deprived of his property interests).

362. Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1268 (1975).

procedures grant commission members far-reaching authority to issue orders as they see fit.[363] State-level statutory amendments would ensure that local governments and their respective commissions have limited authority.[364] Furthermore, although *Stewart* conscientiously weighs both the first and second factors of *Eldridge*, increasingly cost-effective measures should be considered to address the third *Eldridge* factor.[365] Just as the "[D]ue [P]rocess [C]lause requires reliance on both reason and passion for its interpretation,"[366] these rules take into account all of the interests considered in *Eldridge*.

A. *Additional Procedural Safeguards Regarding Homesteads*

Justice Brennan once suggested that due process jurisprudence must necessarily consider the "drastic consequences" to an individual.[367] In Minnesota, similar sentiments are recognized in

363. In fact, commentators believe that municipal agencies are granted such latitude that decisions become arbitrary. *See* Denise Mcvea, *Razing Hopes (Part I): Thousands of People in Dallas Need a Cheap Place to Live. So Why Is the City Destroying Homes that Could be Saved?*, DALL. OBSERVER, Nov. 2, 1995, http://www.dallasobserver.com/1995-11-02/news/razing-hopes-part-i/ ("It is a city where Urban Rehabilitation Standards Board hearings deteriorate into cheap theatre, its members handing down rulings seemingly based on whim. Citizens' rights are often overlooked and sometimes plain ignored, and inadequacies in the system have resulted in improper demolitions of homes."); *see also* Elaine Wolff, *Kangaroo Court (Part I): Meet the City's New Extra-Constitutional Crime-Fighting Tool*, SAN ANTONIO CURRENT, Apr. 21, 2010, http://sacurrent.com/printStory.asp?id=71078 (explaining how the DSDB considers drug use, prostitution, and other criminal activities to justify its decision to demolish a building; but not actually addressing the structure's habitability).

364. *See* Bryan M. Seiler, Note, *Moving from "Broken Windows" to Healthy Neighborhood Policy: Reforming Urban Nuisance Law in Public and Private Sectors*, 92 MINN. L. REV. 883, 893–94, 899 (2008) (describing the need for reform in public nuisance laws and further indicating that such reform could best be accomplished by the legislator at the state level).

365. By creating de novo judicial review for all administrative decisions regulating public nuisances, the *Stewart* court considered both the individual's interest in his property and the potential for mistakes that can be made by a body composed of persons who are not required to have a legal background, but it did not take into account the government's interest in efficiency and expediency. *See Stewart*, 2012 WL 247966, at *5 (addressing only the first two considerations).

366. William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law"*, 10 CARDOZO L. REV. 3, 13 (1988).

367. *See id.* at 20 (noting that the termination of welfare rights requires a trial-type hearing because of the "drastic consequences" suffered when an individual loses his only form of subsistence); *see also* Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (holding that a pretermination hearing is required if the welfare rights of an individual are to be ended

regard to demolition orders.[368] Actions to abate nuisances that derive from a local government's police power are "executed prudently to avoid unnecessary curtailment of the rights of owners of private property."[369] The "prudent" standard adopted in Minnesota requires the opportunity for remediation before demolition and acknowledges that the taking of real property is severe, especially when property owners are required to pay for this taking.[370]

The complexities inherent in a modern bureaucratic state afford no "static solution." However, as modern norms develop, innovative solutions that balance both rationality and empathy should be created.[371] The reality is that people live in many of the properties that are subject to demolition hearings before building and standards commissions.[372]

Accordingly, concessions should be made for individuals' homesteads.[373] The City of Dallas has already recognized these considerations. In fact, it issued a moratorium on demolitions of homestead properties due to criticism of excessive demolition orders.[374]

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because welfare payments are deemed to be a property interest and their termination often deprives an individual of her only means of subsistence).

368. Vill. of Zumbrota v. Johnson, 161 N.W.2d 626, 630 (Minn. 1968) (recognizing the property owner's need for the state to prudently exercise its police powers because of the consequences that can result from an overzealous use of power).

369. *Id.*

370. *Id.* at 628 (holding that Minnesota law, by its terms, requires state officials to provide land owners with a reasonable amount of time to fix any repairs that the landowner has been made aware of by the city's notice).

371. *See* William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law"*, 10 CARDOZO L. REV. 3, 22 (1988) (asserting that each era will encounter unique problems arising from the growth of the bureaucratic state and that, when addressing these concerns, it is essential to "blend rationality and empathy" to comport with the Constitution).

372. *See* Denise Mcvea, *Razing Hopes (Part I): Thousands of People in Dallas Need a Cheap Place to Live. So Why Is the City Destroying Homes that Could be Saved?*, DALL. OBSERVER, Nov. 2, 1995, http://www.dallasobserver.com/1995-11-02/news/razing-hopes-part-i/ (describing the vast quantity of single-family homes that the City of Dallas has demolished in a given year).

373. *See generally* TEX. CONST. art. VIII, § 1-b (providing a residential homestead exemption).

374. *See* Denise Mcvea, *Razing Hopes (Part I): Thousands of People in Dallas Need a Cheap Place to Live. So Why Is the City Destroying Homes that Could be Saved?*, DALL. OBSERVER, Nov. 2, 1995, http://www.dallasobserver.com/1995-11-02/news/razing-hopes-part-i/ ("Because of criticisms that the city was demolishing too many homes

Building and standards commissions and their respective staff of legal counsel, investigators, city bureaucrats, and building inspectors should make sufficient inquiries to discern whether subject property is an individual's homestead.[375] Building inspectors are already required to make other kinds of investigations and evaluations.[376] Although this requirement may be perceived as an additional duty, in most cases, it should be a consequential discovery inevitably resulting from the required initial investigation to find the owner of the subjected property.[377] Alternatively, building and standards commissions can make this discovery themselves by simply making the pertinent inquiries to a property owner or other interested party. If the property is deemed to be the individual's homestead, building and standards commissions should adopt the heightened standard enacted in Minnesota, which requires that local governments act prudently to respect an individual's property rights.[378] By adopting this higher standard, Texas jurisprudence would comport with the first

in poor minority neighborhoods, the city council issued a moratorium on demolitions of single-family, owner-occupied homes in October 1994.").

375. *See* Elaine Wolff, *Kangaroo Court (Part I): Meet the City's New Extra-Constitutional Crime-Fighting Tool*, SAN ANTONIO CURRENT, Apr. 21, 2010, http://sacurrent.com/printStory.asp?id=71078 (reporting that the San Antonio DSDB utilizes police officers, specialized task forces, firefighters, and city attorneys when deciding whether or not to demolish a property); *cf.* TEX. LOC. GOV'T CODE ANN. § 54.033(b) (West 2008) (establishing that members of building and standards commissions are appointed by local governments to determine cases regarding alleged violations of ordinances).

376. For example, in Mesquite, Texas, a Residential Building Inspector is required to make numerous kinds of inspections to "[e]nforce compliance with applicable codes, ordinances and regulations" and also to "recommend modifications and adjustments as necessary to comply with minimum property standards." CITY OF MESQUITE, TEX., JOB DESCRIPTION, http://www.cityofmesquite.com/hr/documents/AS001117.pdf (last visited Oct. 11, 2011).

377. *See* LOC. GOV'T § 214.001(b)(2) (West Supp. 2011) (explaining that the ordinance must require that proper notice be given to the owner of a building before demolition occurs). If the owner cannot be found or if the municipality chooses, it must make a "diligent effort" to find any mortgagees and lienholders. *Id.* § 214.001(d)–(e).

378. *See* Vill. of Zumbrota v. Johnson, 161 N.W.2d 626, 630 (Minn. 1968) (adopting a "prudent standard" to be implemented when exercising the state's police power to prevent the deprivation of an individual's right to his property).

Eldridge factor—the extent to which private interests are affected.[379]

A person's primary residence has significant utility beyond its economic value and should be treated as such for due process purposes.[380] Furthermore, it does not appear that the resulting burdens on the government would be especially extensive, which is in accord with the third factor of *Eldridge*.[381] Therefore, when one conducts the balancing approach set forth in *Eldridge*, it is evident that the government must take heightened precautions to ensure that the due process rights of the property owner remain intact.

B. *Streamlined Hearings Before a Neutral Decision Maker*

In accordance with the concerns addressed by Judge Dennis in the preceding section regarding the neutrality of building and standards commissions, the tribunal with jurisdiction to hear an original public nuisance case could be amended so that a single, neutral magistrate judge may adjudicate public nuisance hearings.[382] There are legitimate concerns that building and standards commissions are partial toward the local governments by which they are appointed.[383] Instead of having a commission composed of a group of five persons,[384] the magistrate charged

379. *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (asserting that when determining whether a person's due process rights have been violated, it is important to weigh the private interest that will subsequently be affected).

380. *See* Frisby v. Schultz, 487 U.S. 474, 484 (1988) ("The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." (quoting Carey v. Brown 447 U.S. 455, 471 (1980))).

381. *See Eldridge*, 424 U.S. at 334–35 (asserting that the government's interest must be weighed against the effect that such a decision will have on an individual's rights).

382. *See* Freeman v. City of Dallas, 242 F.3d 642, 666–67 (5th Cir. 2001) (Dennis, J., dissenting) (contending that the Due Process Clause requires neutrality to "inform governmental decision[ ]making," and maintaining that this can be reached in adversarial hearings by using a neutral magistrate).

383. *See id.* (arguing that local governments often have substantial pecuniary interests in the outcome of public nuisance proceedings); *see also* Elaine Wolff, *Kangaroo Court (Part I): Meet the City's New Extra-Constitutional Crime-Fighting Tool*, SAN ANTONIO CURRENT, Apr. 21, 2010, http://sacurrent.com/printStory.asp?id=71078 (quoting a local attorney who argued that if board members receive income from a local government in publicly brought civil actions for public nuisances, then this income creates a pecuniary interest and presents conflict of interest issues).

384. Members of building and standards commissions are appointed by local governments. TEX. LOC. GOV'T CODE ANN. § 54.033(b) (West 2008).

with issuing orders could instead be a single person, not necessarily appointed by a local government, but a local judge who serves in a part-time capacity at a local trial court level.

This proposal is both efficient and more equitable than the current procedures. *Stewart* has substantially weakened the finality of administrative commissions regulating public nuisances.[385] Various departments within a respective local government may nevertheless provide testimony, issue briefs, and provide recommendations to the magistrate charged with authority over the local tribunal that hears nuisance cases.[386] However, these recommendations will not wield as much overall influence on the decision making of the hearing.[387] Adopting this approach conforms to the second *Eldridge* factor by not only reducing potential conflicts of interest, but also by ensuring that persons trained in legal matters are making determinations of law.

Also, nuisance hearings generally involve the same type of testimony and remedies in each case.[388] This proposal improves efficiency by inserting a specialized magistrate who will become experienced in the particularities of nuisance hearings.[389] Furthermore, this proposal will eliminate the need for two or more

385. *See* City of Dallas v. Stewart, 55 Tex. Sup. Ct. J. 271, 2012 WL 247966, at *5 (Jan. 27, 2012) (holding that administrative bodies no longer have the discretion to make the final determination in a public nuisance hearing because it is "undoubtedly a judicial question").

386. *Cf.* Elaine Wolff, *Kangaroo Court (Part I): Meet the City's New Extra-Constitutional Crime-Fighting Tool*, SAN ANTONIO CURRENT, Apr. 21, 2010, http://sacurrent.com/printStory.asp?id=71078 (reporting that the local government's witnesses include the code enforcement officers who inspected the property and police officers).

387. *See Stewart*, 2012 WL 247966, at *12 (limiting the jurisdiction of administrative agencies to cases that only require statutory interpretation dealing mostly with procedural inquiries).

388. *See* Castillo-Villagra v. Immigration & Naturalization Serv., 972 F.2d 1017, 1026 (9th Cir. 1992) ("A case before an administrative agency, unlike one before a court, is rarely an isolated phenomenon, but is rather merely one unit in a mass of related cases . . . [which] often involve fact questions which have frequently been explored by the same tribunal." (quoting Walter Gellhorn, *Official Notice in Administrative Adjudication*, 20 TEX. L. REV. 131, 136 (1941) (internal quotation marks omitted) (alteration in original)).

389. *Cf.* Bryan M. Seiler, Note, *Moving from "Broken Windows" to Healthy Neighborhood Policy: Reforming Urban Nuisance Law in Public and Private Sectors*, 92 MINN. L. REV. 883, 910–11(2008) (explaining that housing courts will improve the efficiency of nuisance hearings because they better understand relevant legal issues).

hearings to decide on identical factual issues, which currently occur with the advent of de novo judicial review.[390] While having a judge serve as the magistrate of local administrative hearings admittedly reduces the overall community environment that is prevalent among other commissions,[391] adopting this approach comports with the third *Eldridge* factor by improving overall efficiency of the current process.[392]

C. *Improvements to Notice*

Increased due process could be provided if notice was improved to require language summarizing each individual allegation of the substandard quality of the subject property, along with the building inspector's corresponding report.[393] Additionally, language could be included stating that a property owner should consult an attorney and that evidence is allowed to be challenged through whatever methods a commission may adopt.[394] Commentators have noted that the more detailed and refined

390. It should be noted that although the *Stewart* decision requires de novo judicial review of all administrative decisions regulating public nuisances, the decision did not eliminate the use of administrative tribunals entirely; as such, it is unclear whether Texas cities will disband building and standards commissions. *See Stewart*, 2012 WL 247966, at *12 (acknowledging that administrative agencies may still decide some questions of law but their decisions are stronger or weaker depending on the type of questions they are deciding).

391. *See* Mohilef v. Janovici, 58 Cal. Rptr. 2d 721, 733–40 (Ct. App. 1996) (upholding a board's decision even though the hearing lacked courtroom formalities, inspiring the court to denote the hearing as a mere community meeting).

392. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (requiring an analysis of the governmental interests, including administrative burdens that, if reduced, would make the entire process more efficient).

393. *See* Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1280–81 (1975) (supporting the desire to broaden the notice requirement and noting that it is imperative a property owner be well informed of the allegations against him). Currently, notice only requires that an owner, lienholder, or mortgagee be informed of a hearing and be told that it will have to submit a statement explaining the work required to bring the property into compliance with the ordinance and the time it will take to do this. TEX. LOC. GOV'T CODE ANN. § 214.001(c) (West Supp. 2011).

394. *See* Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1281–89 (1975) (explaining why a property owner should have the ability to present evidence and testimony and articulating the importance of receiving legal representation); *cf.* N.Y. STATE RULES OF COURT § 208.6 (McKinney 2011) (requiring language in all capitals to be included at the top of a summons in consumer credit transactions, presumably in an attempt to advise ordinary persons, who may not be familiar with legal proceedings and their ramifications, of their rights).

notice is, the less necessary other procedural safeguards become.[395] Some jurisdictions already require detailed notice and have not responded favorably to municipalities that only provide generalities and legalese.[396]

The detailed notice requirement comports with what the Ninth Circuit has described as a broader scope of notice in administrative proceedings than would normally be required.[397] One of the reasons for the broader scope is capturing the attention of administrative commissions: "Because of the quantity of similar cases before an agency such as Immigration and Naturalization Services, if notice is not taken more broadly in administrative hearings, litigants have an uphill battle maintaining the attention of the administrative judges."[398]

Some modern decisions are open to the possibility that an additional procedural safeguard might be required to reduce the risk of a wrongful ruling that could deprive a person of his property.[399] This added requirement would lessen this risk and further advance the due process considerations of the second factor of *Eldridge*, while not overly burdening government bureaucratic resources, as local governments are required to provide notice regardless of the proposed heightened measures suggested. Furthermore, this added requirement comports with the principle that the content of notice required in an administrative hearing depends on a balancing of the competing interests involved in a given case.[400] A person's real property is

395. *See* Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1280–81 (1975) (pronouncing that if the notice of hearing provides for great specificity, then the safeguards will be presumed satisfied).

396. *See* Vill. of Zumbrota v. Johnson, 161 N.W.2d 626, 630 (Minn. 1968) (holding that the notice provided to the property owner was inadequate because the language was ambiguous and did not specify what constituted "hazardous building and debris").

397. *See* Castillo-Villagra v. Immigration & Naturalization Serv., 972 F.2d 1017, 1026 (9th Cir. 1992) (holding that administrative hearings require notice that is broader in scope than those rendered in jury trials).

398. *Id.* at 1027.

399. *See, e.g.*, Tea v. City of St. Paul, No. A08-1686, 2009 WL 1853001, at *3 (Minn. Ct. App. June 30, 2009) (suggesting a willingness to consider more thorough notice requirements to better protect private interests when reviewing public nuisance administrative determinations for due process violations).

400. *See* Goss v. Lopez, 419 U.S. 565, 579 (1975) (declaring a need to weigh all of the competing interests, for the given circumstances, when evaluating whether or not the content of the notice was sufficient); Skelly v. State Pers. Bd., 539 P.2d 774, 785 (Cal. 1975)

often the most valuable property that he owns, in more than a pure economic sense, and heightened notice comports with protecting this valuable right.

VII. CONCLUSION

Building and standards commissions have considerable authority to transform a community based on the regulatory police power of a local government to abate public nuisances.[401] There are widespread concerns that local governments are using this authority for improper motives while depriving individuals of their constitutional rights.[402] Losing one's property can be a severe deprivation for many individuals who either live in homes subject to public nuisance abatement or have expended considerable resources for the property as an investment. Observers are often surprised that constitutional due process rights such as appointment of counsel, cross-examination, and right to a neutral

(holding that notice must precede a determination affecting the property rights of an individual, but that the content of the notice is dependent on the competing interest, given the circumstances).

401. *See* Elaine Wolff, *Kangaroo Court (Part I): Meet the City's New Extra-Constitutional Crime-Fighting Tool*, SAN ANTONIO CURRENT, Apr. 21, 2010, http://sacurrent.com/printStory.asp?id=71078 (reporting that the San Antonio DSDB "wields an awesome power" compared to that held by local elected leaders, which leads to houses being demolished and tenants being relocated); *see also* Bryan M. Seiler, Note, *Moving from "Broken Windows" to Healthy Neighborhood Policy: Reforming Urban Nuisance Law in Public and Private Sectors*, 92 MINN. L. REV. 883, 890 (2008) (arguing that local governments traditionally had broad discretion in exercising their respective police power to abate public nuisances).

402. *See* Bryan M. Seiler, Note, *Moving from "Broken Windows" to Healthy Neighborhood Policy: Reforming Urban Nuisance Law in Public and Private Sectors*, 92 MINN. L. REV. 883, 884, 893–94, 905 (2008) (contending that local governments are enacting public nuisance laws to handle not only "problem properties" but also "annoying pets, excessive noise, drug use, sex offenders, and suspicious hangouts," as well as suggesting that public nuisance actions can be fueled by a community's race-based agenda); Elaine Wolff, *Kangaroo Court (Part I): Meet the City's New Extra-Constitutional Crime-Fighting Tool*, SAN ANTONIO CURRENT, Apr. 21, 2010, http://sacurrent.com/printStory.asp?id=71078 (explaining how the city's dangerous structures ordinance gives the governmental agency the power to demolish houses that have become a harbor for vagrants or criminals, and how the issues then become more about the crime than the property itself).

decision maker are non-existent in publicly brought civil actions to demolish an individual's property.[403]

Statutory reforms can and should be made to provide property owners relief when fighting an uphill battle against governmental encroachment on valuable property rights, while considering the overall efficiency of the process of abating public nuisances. Local government actors can act more prudently in the enforcement of ordinances in the case of homesteads, which would save resources while also preserving a valuable right for the individuals living on them. Hearings can be reformed so that a neutral, judicial decision maker serves as a trial-level magistrate judge that regulates public nuisances, thereby streamlining and improving the efficiency of hearings, while ensuring that adequate due process rights are preserved. Lastly, notice can be increasingly detailed, lessening the risk of error inherent in the procedures of public nuisance hearings while providing property owners with increased knowledge of what their rights are.

Due process rights are often the last thing a government actor considers when demolishing property considered a nuisance. Aggrieved property owners who do not have the means to improve their property may feel powerless in their efforts to avoid demolition. Although *Stewart* has recently provided property owners with some relief, the procedures inherent in the process are still far from perfect. This Comment suggests improvements to the process, while considering both the government's interest and the most valuable property a person owns—his or her home.

403. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 28 (1981) (asserting that appointed counsel is unlikely to be provided to indigents appearing before building and standards commissions); Freeman v. City of Dallas, 242 F.3d 642, 666–67 (5th Cir. 2001) (Dennis, J., dissenting) (disagreeing with the majority and arguing that it is of particular importance to have a neutral magistrate to ensure due process in adversarial hearings); Mohilef v. Janovici, 58 Cal. Rptr. 2d 721, 740 (Ct. App. 1996) (deciding that cross-examination is not required in administrative public nuisance hearings).